



राजपत्र, हिमाचल प्रदेश

हिमाचल प्रदेश राज्य शासन द्वारा प्रकाशित

मंगलवार, 15 मार्च, 2022/24 फाल्गुन, 1943

हिमाचल प्रदेश सरकार

LABOUR AND EMPLOYMENT DEPARTMENT

NOTIFICATION

Shimla, the 30th December, 2021

No. Shram (A) 3-8/2021 (Awards) L.C.—In exercise of the powers vested under section 17 (1) of the Industrial Disputes Act, 1947, the Governor Himachal Pradesh is pleased to order the

publication of awards of the following cases announced by the Presiding Officer, Labour Court Shimla on the website of the Department of Labour & Employment Government of Himachal Pradesh:—

Sl. No.	Ref. No.	Respondent	Section
1.	Ref. 128/2019	Sh. Inderjeet Singh <i>V/s</i> M/s Zee Laboratories Ltd.	10
2.	Ref. 38/2017	Sh. Krishan Lal <i>V/s</i> M/s Ganga Dari Hydro Power Pvt. Ltd.	10
3.	Ref. 25/2017	Sh. Madan Lal <i>V/s</i> M/s Ganga Dari Hydro Power Pvt. Ltd.	10
4.	Ref. 26/2017	Sh. Pawan Kumar <i>V/s</i> M/s Ganga Dari Hydro Power Pvt. Ltd.	10
5.	Ref. 37/2017	Sh. Bhajan Dass <i>V/s</i> M/s Ganga Dari Hydro Power Pvt. Ltd.	10
6.	Ref. 41/2017	Sh. Balak Ram <i>V/s</i> M/s Ganga Dari Hydro Power Pvt. Ltd.	10
7.	Ref. 42/2017	Sh. Satpal Singh <i>V/s</i> M/s Ganga Dari Hydro Power Pvt. Ltd.	10
8.	Ref. 43/2017	Sh. Surjan Dass <i>V/s</i> M/s Ganga Dari Hydro Power Pvt. Ltd.	10
9.	Ref. 189/2018	Sh. Umesh Kumar <i>V/s</i> M.D. H.P.T.D.C Shimla	10
10.	Ref. 190/2018	Sh. Rajinder Kumar <i>V/s</i> M.D. H.P.T.D.C Shimla	10
11.	Ref. 191/2018	Sh. Neem Chand <i>V/s</i> M.D. H.P.T.D.C Shimla	10
12.	Ref. 193/2018	Sh. Surender Kumar <i>V/s</i> M.D. H.P.T.D.C Shimla	10
13.	Ref. 37/2018	Sh. Leela Dhar <i>V/s</i> M.D. H.P.T.D.C Shimla	10

By order,

R. D. DHIMAN, IAS
Addl. Chief Secretary (Lab. & Emp.).

Inderjeet Singh *V/s* M/s Zee Laboratories Ltd.

Ref. No. 128 of 2019

26-10-2021

Present:— Petitioner in person with Shri Prateek Kumar, Advocate. Shri Arshi Khan, Assistant Manager, HR for respondent.

At this stage, it has been stated by the petitioner that he has settled the matter with the respondent company as the company had taken him back in service. To this effect the statement of the petitioner has been recorded separately.

Vide separate statement, it has been stayed by Shri Arshi Khan, Assistant Manager, HR for respondent that they have settled with matter with the petitioner as the petitioner has been taken back on job.

In view of the aforesaid statement of the petitioner as well as Shri Arshi Khan, Assistant Manager, HR for the respondent, the Industrial Dispute arose between the parties, on account of reference received from the appropriate government vide notification No.11-1/86(Lab)ID/2019-Paonta/Inderjeet dated 27-08-2019, registered before this tribunal as Reference petition No-128 of 2019, stood amicably settled and I am satisfied that the parties have arrived at lawful compromise, hence, the aforesaid reference petition is hereby ordered to be dismissed as having been settled. The statement of the petitioner as well as Shri Arshi Khan, Assistant Manager, HR for respondent shall form part and parcel of this order. Let a copy of this award be sent to the appropriate government for publication in the official gazette.

File, after completion be consigned to records.

Announced:
26-10-2021.

(RAJESH TOMAR),
Presiding Judge,
Industrial Tribunal-cum-Labour Court, Shimla.

Camp at Rampur.

BEFORE RAJESH TOMAR

PRESIDING JUDGE H.P. INDUSTRIAL TRIBUNAL-CUM-LABOUR COURT, SHIMLA

Reference Number: 38 of 2017

Instituted on: 2-3-2017

Decided on: 1-11-2021

Krishan Lal s/o Shri Hari Singh r/o Village Urman, P.O. Munish Bahali, Tehsil Rampur,
District Shimla, H.P. . *Petitioner.*

Versus

1. M/s Ganga Dari Hydro Project (P) Ltd., Gamba House South End Lane IV, New Shimla-9, H.P.

2. M/s Ganga Dari Hydro Project (P) Ltd. Jogni, P.O. Munish Bahali, Tehsil Rampur,
District Shimla, H.P. . *Respondents.*

Reference under section 10 of the Industrial Disputes Act, 1947

For the Petitioner: Shri Niranjana Verma, Advocate

For the Respondent: Shri Malkiyat Singh, Advocate

AWARD

The following reference has been sent by the Appropriate Government for final adjudication:

“Whether demand of Shri Krishan Lal s/o Shri Hari Singh, Village Urman, P.O. Munish Bahali, Tehsil Rampur District Shimla regarding his re-engagement in service before the management of M/s Ganga Dari Hydro Power Pvt. Ltd., Gamba House South End Lane IV Phase-1, New Shimla 171009 (site office M/s Ganga Dari Hydro Power Pvt. Ltd., Jogni, P.O Munish Bahali, Tehsil Rampur, District Shimla [H.P.) after getting his full & final dues, is legal and justified? If yes, what relief the above workman is entitled to from the above management?”

2. On receipt of reference from the Appropriate Government, notices were issued to the concerned parties in pursuance to which the petitioner has filed his statement of claim.

3. Material facts necessary for the disposal of the reference are thus that initially the petitioner was engaged by the respondent as helper on 22-7-2011 and worked continuously till 31-3-2014 when his services had been terminated after giving notice and retrenchment compensation despite the fact that his juniors namely Prem Singh, Uttam Singh, Deep Kumar, Anil Kumar, Ranveer, Bhagat Singh, Dharam Singh and Yashpal have been retained in service and even new persons have been engaged by the respondents. The services of the petitioner have been terminated without following the procedure in accordance with law, hence, the action of the respondents in in violation of sections 25-F and 25-N of the Industrial Disputes Act, 1947 (hereinafter to be referred as the Act). It is averred that before terminating the services of the petitioner no reasonable opportunity was afforded to him and mere giving the notice is not sufficient for disengaging his services. Lastly, it is averred that the termination of the petitioner is illegal and against the principles of the natural justice and contrary to Article 14, 16 and 21 of the Constitution of India. The following relief clause has been appended in the footnote of statement of claim as under:

It is, therefore, respectfully prayed that keeping in view the facts and circumstances narrated in the statement of claim, the termination orders dated 31-3-2014, may kindly be quashed and the services of the petitioner may kindly be reinstated retrospectively with all consequential benefits including continuity in service, seniority, full back-wages etc. in the interest of justice and fair play.

4. The lis was resisted and contested by filing written reply on *inter-alia* preliminary objections that there is no industrial dispute as defined in section 2(k) of the Act, petitioner is not a workman as defined under section 2(s) of the Act, there is no employee and employer relationship between the petitioner and the respondents, this Tribunal is having no jurisdiction, the dispute raised by the petitioner is hopelessly barred by time and the dispute raised by the petitioner is an issue covered under Contract Labour (regulation and Abolition) Act, 1970. It is asserted that in the year 2006, 16 MW Jogini Hydroelectric Project was awarded to the respondent company by the Government of Himachal Pradesh in accordance with the policies of the State and Central Government for development and promotion of generation of electricity from small hydro power plants in the state of Himachal Pradesh and in the Country, hence, a memorandum of understanding was executed with the State of Himachal Pradesh on 27-10-2006 and after that the respondents submitted the DPR for execution of project to the Government upon which an agreement was reached between the State of H.P. and the respondents for implementation of the Project. The Project being small scale hydroelectric project would require unskilled workers for a limited period *i.e* during the construction/development stage only and once the project is commissioned, only a

limited number of technical workforce is required for overseeing the O&M activities of the power plant and as such the respondents have engaged the contractors for the implementation of the project. It is further asserted that the project was executed through the contractors as the respondent company was registered under the provisions of Contract Labour (Regulation & Abolition) Act, 1970. The petitioner was engaged by M/s Vasistha Earth Works who was one of the contractors of the respondents and wages to him have also been paid by the above contractor, hence there was never a relationship of employer and employee between the petitioner and respondents and as such the petitioner has no legal right to claim employment from the respondents. Since, the work which had been awarded to the contractor M/s Vasistha Earth Works was completed, hence, the petitioner was retrenched by the contractor in accordance with law after payment of retrenchment benefits *i.e.* one month's wages in lieu of retrenchment notice, retrenchment compensation and leave salary. It is also asserted that the claim of the petitioner is barred by delay as the petitioner was retrenched in the year 2014 and the matter has been referred by the appropriate government in the year 2017.

5. On merits, it is denied that the petitioner was ever working with the respondents. There is no question of retaining any junior person. The petitioner was never engaged by the replying respondent rather he was engaged by the contractor M/s Vasistha Earth Works. The petitioner has admitted that he has already been given the retrenchment notice and received retrenchment compensation. The other factum with respect of the engagement of the petitioner can only be replied by the Contractor *i.e.* M/s Vasistha Earth Works. It was only after commissioning of the project, the respondent has engaged limited O&M skilled staff. There is no question of engaging any junior person as the petitioner and others have been engaged by M/s Vasistha Earth Works. The question of alleged seniority of the petitioner or other persons is also denied. It is prayed that the claim may be dismissed.

6. In rejoinder, the petitioner While controverting the averments made thereto in the reply and there by reaffirming and reiterating the contents of statement of claim.

7. On elucidating the pleading of parties, the following issues were struck down by my Learned Predecessor for its final determination *vide* Court order dated 20-9-2018.

1. Whether the demand of the petitioner regarding his reengagement in service before the management of respondents after getting his full & final dues is legal and justified? . . .*OPP.*
2. If issue No. 1 is proved in affirmative to what relief of service benefits the petitioner is entitled? . . .*OPP.*
3. Whether the petitioner is not a workman as alleged? . . .*OPR.*
4. Whether there is no relationship of employee and employer between the petitioner and the respondents, as alleged? . . .*OPR.*
5. Whether the dispute raised by the petitioner is barred by time, as alleged? . . .*OPR.*
6. Whether there is no cause of action available to the petitioner due to the non-impleadment of Vasistha Earth Works as alleged? . . .*OPR.*
7. Whether the claim petition is not maintainable as alleged? . . .*OPR.*
8. Relief

8. Henceforth, parties to the dispute were asked to adduce oral as well as documentary evidence in support of their respective claims or issues so framed.

9. I have heard the Learned Counsel for the parties and also gone through the record of the case carefully.

10. For the reasons to be recorded hereinafter, while discussing the aforesaid issues, my findings on the aforesaid issues are as follows:

<i>Issue No. 1:</i>	<i>Yes</i>
Issue No. 2:	Entitled to reinstatement with seniority and continuity but without back-wages.
Issue No. 3:	No
Issue No. 4:	No
Issue No. 5:	No
Issue No. 6:	No
Issue No.7:	No
Relief:	Reference partly answered in favour of the petitioner as per operative part of the Award.

REASONS FOR FINDINGS

Issues No. 1 & 6 :

11. Both these issues are intermingled and inter connected, as mutually existed and required the common appreciation of evidence, being taken up together for the purpose of their determination and adjudication.

12. Shri Niranjana Verma, Advocate for the petitioner contended with all vehemence that the petitioner was working with the respondent continuously upto 31-3-2014, when the services of the petitioner were terminated after giving notice and retrenchment compensation despite the fact that the respondent had retained the persons junior to him. The services of the petitioner have been terminated without following the procedure. The petitioner was working continuously with the respondent since 22-7-2011. No reasonable opportunity was afforded to the petitioner in accordance with law. Mere giving of notice is not sufficient for the purpose of disengaging the services of the petitioner, more particularly, when the work is available with the respondent. The termination of the petitioner is totally illegal and against the principles of natural justice. The action on the part of the respondent is in violation of sections 25-F, 25-G and 25-H of the Act.

13. *Per contra*, Shri Malkiyat Singh, Advocate for the petitioner strenuously argued that after the award of Hydro Electric Project to the respondent, the memorandum of understanding was executed with State of Himachal Pradesh on 27-10-2006. On detailed investigations and techno-economic studies of the project, detailed report was submitted to the Government of H.P. for execution of Project and thereafter the agreement was executed between the State and the respondent for the implementation of the project. The work was executed through different contractors. M/s Vasistha Earth Works is one of the contractor who has employed the workers for the execution of the civil work. The petitioner/claimant was engaged by M/s Vasistha Earth Works. The muster rolls were prepared and wages were also paid to the petitioner by M/s Vasistha Earth

Works. At the time of retrenchment, the claimant was paid full & final retrenchment compensation by the M/s Vasistha Earth Works. He further argued that from the testimony of Shri Nirmal Kumar (RW-1) and Lachmi Dass (RW-2), it is proved that the present workers are the workers of M/s Vasistha Earth Works, who is an independent contractor registered under the Labour Contract (Regulation & Abolition) Act. It is the liability of the independent contractor to re-employ the petitioner/claimant.

14. Learned counsel appearing on behalf of the respondent further contended that the present claim petition is not maintainable as the respondent was not the employer of the petitioner and he was engaged by the Contractor, does not fall within the ambit of the Act. It is therefore, prayed that the claim petition may kindly be dismissed.

15. I have given my best anxious considerable thought to the respective submissions of the Learned Counsel for the petitioner, as well Learned Counsel for the respondent and have also scrutinized the entire case record with minute care, caution and circumspection.

16. The petitioner namely Krishan examined himself as (PW-1) and thereby reiterated the contents of the statement of claim. He was working as a helper since 22-7-2011 till 31-3-2014. The respondent had only paid PF while terminating his services. The respondent had also issued identity card (PW-1/A). He has completed 240 days in all calendar years while working with the respondent. The respondent has retained persons junior to him. There is still work in the project. The respondents are still engaging fresh hands even today. It is prayed that his termination may be quashed and set aside and he may be reinstated with all consequential benefits.

17. In cross-examination, he feigned ignorance that Vasistha Earth Works had terminated his services after paying him the retrenchment compensation. He denied that he was the worker of Vasistha Earth Works and not that of the respondent. He feigned ignorance that the entire work was got executed by the respondent from the sub-contractor and the respondent had a licence in this behalf. He admitted that the name of the contractor has been reflected as Vasistha Earth Works in (PW-1/A). He denied that he was never the employee of Ganga Dhari Hydro Power project but he was the worker of the Vasistha Earth works.

18. Conversely, Shri Nirmal Kumar Yadav, Dy. G.M Gangadhari Hydro Power Pvt. Ltd., Jogni, testified as (RW-1). He reiterated the contents of the reply thereto in verbatim. He deposed that the project in question is a small hydro project and is presently supplying electricity to the HPSEB. During the course of executing the project the respondent Gangadhari Hydro Power Ltd., had engaged contractors for civil and electric work. The respondent had got itself registered under the H.P. Contract Labour (Regulation & Abolition) Act. The registration certificate is (RW-1/C) and the details of the contractors to whom the work was allocated is reflected in (RW-1/C). The petitioner had been engaged by Vashishtha Earth Works for the purpose of executing civil work. The wages and the muster rolls in this behalf were also prepared by the said Vasistha Earth Works. Some of the extracts showing that the muster rolls were maintained by Vasistha Earth Works are (RW-1/D) and (RW-1/E). The name of the petitioner and other workmen who have challenged their termination is reflected in the muster roll at serial number 9, 10, 12, 15, 21, 25 and 30. The petitioner had been retrenched by the contractor after the work had come to an end. As per (RW-1/F), the petitioner was paid full & final settlement by Vasistha Earth Works at the time of his retrenchment. The petitioner had received the said compensation without any protest. After the work had finished the respondent had retained the records of the contractors for the purpose of maintaining record. As of today there are only 22 staff members who have been engaged for looking after the operational and maintenance requirements of the project. Out of the aforesaid 22 staff only 10 are unskilled workers. Vasistha Works had also issued I.D. Card to the workers and sought permission from the Labour Department in this behalf. The I.D Cards bears the signatures of

the contractors only. The petitioner was never the worker of the respondent and he had never been terminated by the respondent. There are no persons junior to the petitioner in the engagement of the respondent Gangadhari.

19. In cross-examination, he expressed his ignorance that (PW-1/A) was an offer of appointment issued by the respondent Gangadhari. He denied that the petitioner and other workers were the employees of the respondent Gangadhari and the Identity Card had also been issued by them. He denied that the petitioner and other workers had not been retrenched by Vasistha Earth Works by the respondent. He feigned ignorance that Prem Singh, Uttam Singh, Deep Kumar, Anil Kumar, Ranvir, Bhagat Singh, Dharam Singh and Yashpal who were junior to the petitioner are still working with the respondent Gangadhari. He denied that the full & final settlement placed on record is a fraud and signatures of the petitioner are also forged. He denied that the muster rolls (RW-1/D) and (RW-1/E) are also forged and fabricated. He further denied that the petitioner was the employee of the Gangadhari and had been illegally terminated.

20. The respondent has also examined (RW-2) Shri Lachi Dass, who stated that the respondent had engaged contractors for construction, civil and electric works. There were four contractor namely Bajrang Construction, Vashistha Works, A.K Raghu and one Kali Bahadur. The petitioner had been engaged by the Vashistha Works and as a principal employer they were only supervising the work of the labour. They only used to supervise that the wages were being paid to the workers and they were the same whose names were reflected in the muster rolls. The contractor had paid them the retrenchment compensation in his presence.

21. In cross-examination he denied that (PW-1/A) bears the signatures of the management. Volunteered that the signatures are of the contractors. He admitted that the 22 workers presently working were engaged after the engagement of the petitioner. He denied that the petitioner was the employee of Vashistha Earth Works and not of Gangadhari.

22. (RW-1/A) is the copy of resolution dated 7-1-2017, authorizing Shri Nirmal Kumar Yadav to institute, defend and represent the respondent in the Court proceedings.

23. (RW-1/B) is the copy of letter dated 1-4-2014, on the subject 2x8.0 MW Jogini-SHEP-Synchronization Commissioning and achieving Commercial operation of Power House whereby final approval has been accorded to commission Jogini Power House Project to operative *w.e.f.* 27-3-2014, addressed to Chief Engineer (SO&P) HPSEB, copy of which was forwarded to the respondent M/s Gangdhari Hydro Power Pvt. Ltd.

24. (RW-1/C) is the copy of details of contractors/company and work awarded/allotted in respect of Jogini SHEP whereby the work of Civil and construction at Jogini site Rampur was allotted to Vasistha Earth Works, the work of tunnel at Jogini site, Rampur was allotted to Bajrang constructions, the work of fabrication at Bhadarsh Rampur was allotted to AK Raghu and civil work at Jogini site Rampur was allotted to Kali Bahadur.

25. (RW-1/D) and Ex. RW-1/E are the copies of muster rolls issued by Vasista Earth Works.

26. (RW-1/F) is the copy of full & final statement of the petitioner and retrenchment compensation given to the petitioner.

27. On the contrary, (PW-1/A) is the identity card issued in the name of the petitioner by Gangadhari Hydro Power (P) Ltd. and duly attested by Labour Officer Rampur Zone.

28. Before adverting to the rival legal contentions advanced on behalf of the parties, it is important to consider the relevant provisions of the Act in play in the instant case.

The Industrial Disputes Act, 1947, is:

“An act to make provision for the investigation and settlement of industrial disputes, and for certain other purposes”

Section 2(s) defines a Workman as:

“2(s). “workman” means any person (including an apprentice) employed in any industry to do any manual, unskilled, skilled, technical, operational, clerical or supervisory work for hire or reward, whether the terms of employment be express or implied, and for the purposes of any proceeding under this Act in relation to an industrial dispute, includes any such person who has been dismissed, discharge or retrenched in connection with, or as a consequence of, that dispute, or whose dismissal, discharge or retrenchment has led to that dispute, but does not include any such person:—

- (i) who is subject to the Air Force Act, 1950 (45 of 1950), or the Army Act, 1950 (46 of 1950), or the Navy Act, 1957 (62 of 1957); or
- (ii) who is employed in the police service or as an officer or other employee of a prison; or
- (iii) who is employed mainly in a managerial or administrative capacity; or
- (iv) who, being employed in a supervisory capacity, draws wages exceeding [ten thousand rupees] per mensem or exercises, either by the nature of the duties attached to the office or by reason of the powers vested in him, functions mainly of a managerial nature”

Section 2(oo) lays down the concept of retrenchment as:

“Retrenchment means the termination by the employer of the service of a workman for any reason whatsoever, otherwise than as a punishment inflicted by way of disciplinary action, but does not include—

- (a) voluntary retirement of the workman;
- (b) retirement of the workman on reaching the age of superannuation if the contract of employment between the employer and the workman concerned contains a stipulation in that behalf;
- (bb) termination of the service of the workman as a result of the non-renewal of the contract of employment between the employer and the workman concerned on its expiry or of such contract being terminated under a stipulation in that behalf contained therein;”
- (c) termination of the service of a workman on the ground of continued ill-health”

29. On the other hand, the learned counsel appearing on behalf of the petitioner contended that the petitioner is squarely covered under the definition of “workman” under the Act.

30. I am unable to agree with the contention advanced by the learned counsel appearing on behalf of the respondent. The question “who is a workman” has been well settled by various judgments of the Hon’ble Supreme Court. In the case of *H.R. Advanthaya vs. Sandoz (India) Ltd.* (1997) 5 SCC 737, a Constitution Bench of the Hon’ble Supreme Court has held as under:

“..We thus have three Judge Bench decisions which have taken the view that a person to be qualified to be a workman must be doing the work which falls in any of the four categories, viz, manual, clerical, supervisory or technical and two two-judge Bench decisions which have by referring to one or the other of the said three decisions have reiterated the said law. As against this, we have three three-judge Bench decisions which have without referring to the decisions in May & Baker, WIMCO and Bunnah Shell cases (supra) have taken the other view which was expressly negated, viz., if a person does not fall within the four exceptions to the said definition he is a workman within the meaning of the ID Act. These decisions are also based on the facts found in those cases. They have, therefore, to be confined to those facts. Hence the position in law as it obtains today is that a person to be a workman under the ID Act must be employed to do the work of any of the categories, viz., manual, unskilled, skilled, technical, operational, clerical or supervisory. It is not enough that he is not covered by either of the four exceptions to the definition. We reiterate the said interpretation.”

31. It is contended on behalf of the respondent that the services of the petitioner had been engaged by the contractor on contractual basis which is purely temporary and co-terminus with the project. The services of the petitioner stood automatically terminated by issuance of retrenchment notice and by making full & final retrenchment compensation.

32. Admittedly, there is absolutely no denial to the fact that the petitioner worked as helper with the respondent *w.e.f.* 22-7-2011 till 31-3-2014. It is not in dispute that the respondent had time and again raised the issue that the petitioner had worked as a contractual labor with the Vasistha Earth Works as is evident from the muster roll (RW-1/D) and (RW-1/E), which is month wise attendance of the petitioner. The muster roll is the month wise attendance detail of the petitioner who has worked as helper being a contractual employee purely temporary in nature. Thus, there are evidence available on record particularly the documents (RW-1/B), the copy of letter dated 1-4-2014, it could be legitimately held that it is the respondent Gangadhari who were allotted to into 8.0 MW, Jogini State Small Hydro Power Project-Synchronization Commissioning and achieving commercial operation of Power house *w.e.f.* 27-3-2014. In the said letter there is no reference to M/s Vasistha Earth Works. The only case pleaded from the side of the respondent is that since the civil, construction and fabrication works were allotted by the respondent to various contractors namely Vasistha Earth Works, Bajrang constructions, AK Raghu and Kali Bahadur and the petitioner and other workers had been engaged by contractors. It is proved on record that the petitioner had been engaged by the respondent on fixed salary of Rs. 3384/ per month. It appears that he had accepted such offer as per the full & final statement (RW-1/F). It is also admitted fact that the petitioner had worked continuously from 22-7-2011 till 31-3-2014 when the petitioner was paid full & final retrenchment compensation after giving the retrenchment notice. It is argued that such notice or compensation on account of his retrenchment was given by Vasistha Earth Works, therefore, it is Vasistha Earth Works who is responsible and not the respondent. It was vociferously argued by the petitioner that Shri Nirmal Kumar Yadav (RW-1) during his cross-examination has categorically admitted that the petitioner and other workers were issued identity cards by the respondent. He also halfheartedly feigned ignorance that the offer of appointment was issued by the respondent. He again feigned ignorance that the persons junior to the petitioner namely Prem Singh, Uttam Singh, Deep Kumar, Anil Kumar, Ranvir, Bhagat Singh, Dharam Singh and Yashpal are still working with the respondent. Thus, this admission automatically proved the case of the petitioner. The recital of the letter (RW-1/B) clearly shows that the respondent had been allotted the synchronization commissioning and achieving commercial operation of Power House. So far as concerning the engaging of various contractors to execute the work on contractual basis, it is admitted that the identity cards were issued by the respondent. The identity card (PW-1/A) clearly shows that the petitioner was the worker/employee of Gangadhari Hydro Power Project, which has been duly attested by the Labour Officer. It is the basic law that documentary evidence as

compelled oral evidence, has given to weight. Thereafter, as per full & final statement (RW-1/F), the petitioner had been paid the full & final payment towards retrenchment compensation on issuance of retrenchment notice by Vasistha Earth Works whereby the petitioner was shown to be helper and joined the company since 19-10-2010. The petitioner was engaged on fixed salary of Rs. 3708/- per month and worked continuously *w.e.f.* 19-10-2010 till 31-3-2014. As discussed above, as per identity card (PW-1/A) the petitioner is shown to have been employed as helper by the respondent wherein the necessary particulars of the petitioner were duly recorded. It is manifested that only after accepting the terms and conditions of the appointment, the petitioner had been working with the respondent as helper and had continuously worked till 31-3-2014. Therefore, the entire documentary proof placed on record duly unfold that the services of the petitioner had been engaged by the respondent company.

33. The petitioner as per his pleadings and evidence on record clarified that he was relieved from his duties by issuance of retrenchment notice on making retrenchment compensation as on 31-3-2014.

34. So far as concerning the retrenchment of a workman there are certain conditions, procedure which requires to be qualified as provided under section 25-F, 25-G and 25-H of the Act, which reads as under:

25F. Conditions precedent to retrenchment of workmen.—

No workman employed in any industry who has been in continuous service for not less than one year under an employer shall be retrenched by that employer until—

- (a) the workman has been given one month's notice in writing indicating the reasons for retrenchment and the period of notice has expired, or the workman has been paid in lieu of such notice, wages for the period of the notice;
- (b) the workman has been paid, at the time of retrenchment, compensation which shall be equivalent to fifteen days' average pay² for every completed year of continuous service or any part thereof in excess of six months; and
- (c) notice in the prescribed manner is served on the appropriate Government³ or such authority as may be specified by the appropriate Government by notification in the Official Gazette”.

25G. Procedure for retrenchment.—Where any workman in an industrial establishment, who is a citizen of India, is to be retrenched and he belongs to a particular category of workmen in that establishment, in the absence of any agreement between the employer and the workman in this behalf, the employer shall ordinarily retrench the workman who was the last person to be employed in that category, unless for reasons to be recorded the employer retrenches any other workman.

25H. Re-employment of retrenched workmen.—Where any workmen are retrenched, and the employer proposes to take into his employ any persons, he shall, in such manner as may be prescribed, give an opportunity to the retrenched workmen who are citizens of India to offer themselves for re-employment and such retrenched workman who offer themselves for re-employment shall have preference over other persons.

35. Section 25-B of the Act defines continuous service.—In terms of sub section 2 of section 25-B, if a workman during a period of twelve calendar months preceding the date with

reference to which calculations to be made has actually worked under the employer for a period of one year, he will deemed to be in continuous service. Admittedly, the petitioner had been working since May, 2010 till 31-3-2014, which burden of proof has been satisfactorily discharged by the petitioner that he had worked for 240 days in a calendar year which is the bench mark as settled by the **Hon' ble Apex Court in case titled R.M 2006 (1) SCC 106. Similarly, it has been laid down by the Hon' ble Apex Court in 2019 (1) SCC 138** that when the workman had worked for required 240 days of the working in the period of twelve calendar months preceding the date of dismissal, he is entitled to take the benefit of the provisions of section 25-F of the Act.

36. It is claimed by the petitioner that at the time of termination of his services, the persons junior to him were retained by the respondent. Shri Nirmal Kumar Yadav (RW-1) had feigned ignorance that persons junior to the petitioner namely Prem Singh, Uttam Singh, Deep Kumar, Anil Kumar, Ranvir, Bhagat Singh, Dharam Singh and Yashpal are still working with the respondent. A detail of such persons is also given in the statement of claim and rejoinder that junior persons namely Prem Singh, Uttam Singh, Deep Kumar, Anil Kumar, Ranvir, Bhagat Singh, Dharam Singh and Yashpal are still working with the respondent. Though, the respondent has refuted such allegations and claimed that no persons junior to the petitioner had ever been retained. There is no iota of evidence led by the respondent before this Tribunal to prove that no person junior to the petitioner had been retained/engaged in service by the respondent. Though, no seniority list has been proved/placed on record by the petitioner but his oral evidence to the effect that persons junior to him were retained by the respondent and after his retrenchment, they are still working with the respondent. This contention of the petitioner has gone un rebutted and unchallenged, hence, the version of the petitioner that after his termination, persons junior to him were retained by the respondent has to be accepted.

37. Since, the provisions of sections 25-G and 25-H have been contravened, it was not obligatory for the petitioner to have completed 240 days in a block/calendar year. Here, I am fortified by the judgment rendered by our own Hon'ble High Court in case **State of H.P. Vs. Pratap Singh, 2017 (1) HLR 286**. Thus, it can be safely concluded that the respondent has contravened the provisions of section 25-G of the Act as such the termination of the services of the petitioner is held to be illegal and unjustified.

38. However, the allegations set forth from the side of the petitioner that the respondent had violated the provisions of section 25-H, to my mind does not bears to have been substantive. In the petitioner's evidence as (PW-1), he has failed to name those persons who have engaged after his retrenchment. The all material placed on record, thus, being too nebulous to lend any credence to the allegations put forth by the petitioner that new workmen were employed without affording opportunity to the petitioner being retrenched employee for such employment after the termination of the services of the petitioner. Therefore, the respondent cannot be said to have violated the provisions of section 25-H of the Act.

39. Thus, in view of my above discussion, I have no hesitation in holding that the services of the petitioner *w.e.f.* 31-3-2014 have been illegally terminated by the respondent without following the provisions of the Act. Accordingly all these issues are decided in favour of the petitioner and against the respondent.

Issue No. 2 :

40. Since, I have held under issue No.1 above that the services of the petitioner have been illegally terminated by the respondent without complying with the provisions of section 25-F and 25-G of the Act, it is ordered that he be reinstated in service with seniority and continuity. Now, the question which arises for consideration, before this Court is as to whether the petitioner is entitled

to full back wages as contended by the learned counsel for the petitioner. In **(2009) 1 SCC 20, Kanpur Electricity Supply Company Limited Vs. Shamim Mirza**, the Hon'ble Apex Court has held that once the order of termination of services of an employee is set-aside, ordinarily, the relief of reinstatement is available to him. However, the entitlement of an employee to get reinstated does not necessarily result in payment of full or partial back-wages, which is independent of reinstatement. It has further been held by the **Hon' ble Apex Court in 2010 (1) SLJ S.C 70, M/s Ritu Marbals Vs. Prabhakant Shukla that** full back wages cannot be granted mechanically, upon an order of termination be declared illegal. It is further held that reinstatement must not be accompanied by payment of full back wages even for the period when the workman remained out of service and contributed little or nothing to the Industry.

41. Moreover, the petitioner was under an obligation to prove by leading cogent evidence that she was not gainfully employed after the termination of her services. The initial burden is on the workman/employee to show that she was not gainfully employed as held by the **Hon'ble Apex Court in (2005) 2 Supreme Court Cases 363 titled as Kendriya Vidyalaya Sangathan and another Vs. S.C Sharma** that:

16. "When, the question of determining the entitlement of a person to back-wages is concerned, the employee has to show that he was not gainfully employed. The initial burden is on him. After and if he places materials in that regard, the employer can bring on record materials to rebut the claim"

42. For the foregoing reasons, the petitioner has failed to discharge his burden by placing any material on record that he was not gainfully employed after his termination/disengagement.

43. In view of the entire evidence, on record, coupled with the rulings (supra), I have no hesitation in holding that the petitioner is entitled for **reinstatement in service with continuity and seniority. However, the petitioner is not entitled to any back-wages.** Hence, this issue is decided in favour of the petitioner and against the respondent.

Issue No. 3 & 4 :

44. Being interlinked and correlated both these issues are taken up together for discussion and decision.

45. A conjoint reading of Clause G and Clause S of section 2 of the Act would clearly embarked that the workman is a person who has been employed for any manual, unskilled, skilled, technical, operational, clerical or supervisory work for hire or reward, where the terms of employment be expressed or implied and for the purpose of any proceeding under this Act in relation to an industrial dispute, includes any such person who has been dismissed, discharged or retrenched in connection with, or as a consequence of, that dispute, or whose dismissal, discharge or retrenchment has led to that dispute. Similarly, where there is in in relation to an industry carried on by or under the authority of any department Government or a State Government, the authority prescribed in this behalf, or where no authority is prescribed, to be an employer. Clause (j), of the Act provides that any business, trade, undertaking, manufacture or calling of employers and includes any calling service employment, handicraft or industrial occupation or avocation of workmen shall be termed as "industry". Therefore, as per the words embodied in clauses g, j and s of the Act, would clearly emancipate that there is a clear cut relationship of employer and employee between the petitioner and the respondent company. The identity cards were issued in the name of the Gangadhari and mere mentioning the name of its contractor M/s Vasistha Earth Works would tantamount as a comaflauge and nothing else. Accordingly, both these issues are decided in favour of the petitioner and against the respondent.

Issue No. 5 :

46. In support of this issue, no evidence was led by the respondent being the legal issue. However, I have scrutinized the record of the case and observed that there is no limitation under the Industrial Disputes Act, 1947 as it was held by their lordship of **Hon'ble Supreme Court in a case reported in (1999) 6 SCC 82 incase titled as Ajayab Singh Vs. Sirhind Co-operative Marketing –cum-processing Service Society Limited and Another. in which it was held that:—**

“the provisions of Article 137 of Limitation Act, 1963 are not applicable to the proceedings under the ID Act. The relief under the ID Act cannot be denied merely on the ground of delay. The plea of delay if raised by the employer is required to be proved as a matter of fact by showing the real prejudice and not as a merely hypothetical defence. No reference to the Labour Court can be generally questioned on the ground of delay alone”

47. Thus, on the strength of above ruling, it can safely be concluded that this petition is not barred by limitation. Accordingly, this issue is decided in favour of the petitioner and against the respondent.

Issue No. 7 :

48. In support of this issue, no evidence has been led by the respondent. However, the petitioner has filed this claim petition pursuant to the reference made by the appropriate government to this Court for adjudication. I find nothing wrong with this petition which is legally maintainable. Accordingly, this issue is decided in favour of the petitioner and against the respondent.

Relief :

49. As a sequel to my above discussion and findings on issues No.1 to 7, the claim of the petitioner succeeds and is hereby partly allowed resultantly the petitioner is ordered to be **reinstatement in service forthwith with seniority and continuity**. However the petitioner is not entitled to back wages. The reference is ordered to be partly answered in favour of the petitioner and against the respondent. Let a copy of this award be communicated to the appropriate government for publication in official gazette. File, after completion, be consigned to records. Ordered accordingly.

Announced in the open Court today this 1st day of November, 2021.

Sd/-
(RAJESH TOMAR),
Presiding Judge,
Industrial Tribunal-cum-Labour Court, Shimla.

**BEFORE SHRI RAJESH TOMAR PRESIDING JUDGE H.P. INDUSTRIAL TRIBUNAL-
CUM-LABOUR COURT, SHIMLA**

Reference Number : 25 of 2017

Instituted on : 21-2-2017

Decided on :

1-11-2021

Madan Lal s/o Late Shri Gopal Singh, r/o Village Bahali, P.O. Munish Bahali, Tehsil Rampur, District Shimla, H.P. . .Petitioner.

Versus

1. M/s Ganga Dari Hydro Project (P) Ltd., Gamba House South End Lane IV, New Shimla-9, H.P.

2. M/s Ganga Dari Hydro Project (P) Ltd. Jogni, P.O. Munish Bahali, Tehsil Rampur, District Shimla, H.P. . .Respondents.

Reference under Section 10 of the Industrial Disputes Act, 1947

For the Petitioner: Shri Niranjana Verma, Advocate

For the Respondent: Shri Malkiyat Singh, Advocate

AWARD

The following reference has been sent by the Appropriate Government for final adjudication:

“Whether demand of Shri Madan Lal s/o Shri Gopal Singh, Village Bahali, P.O. Munish Bahali, Tehsil Rampur District Shimla regarding his re-engagement in service before the management of M/s Ganga Dari Hydro Power Pvt. Ltd., Gamba House South End Lane IV Phase-1, New Shimla 171009 (site office M/s Ganga Dari Hydro Power Pvt. Ltd., Jogni, P.O. Munish Bahali, Tehsil Rampur, District Shimla (H.P.) after getting his full & final dues, is legal and justified? If yes, what relief the above workman is entitled to from the above management?”

2. On receipt of reference from the Appropriate Government, notices were issued to the concerned parties in pursuance to which the petitioner has filed his statement of claim.

3. Material facts necessary for the disposal of the reference are thus that initially the petitioner was engaged by the respondent as helper on 1-10-2010 and worked continuously till 31-3-2014 when his services had been terminated after giving notice and retrenchment compensation despite the fact that his juniors namely Prem Singh, Uttam Singh, Deep Kumar, Anil Kumar, Ranveer, Bhagat Singh, Dharam Singh and Yashpal have been retained in service and even new persons have been engaged by the respondents. The services of the petitioner have been terminated without following the procedure in accordance with law, hence, the action of the respondents in violation of sections 25-F and 25-N of the Industrial Disputes Act, 1947 (hereinafter to be referred as the Act). It is averred that before terminating the services of the petitioner no reasonable opportunity was afforded to him and mere giving the notice is not sufficient for disengaging his services. Lastly, it is averred that the termination of the petitioner is illegal and against the principles of the natural justice and contrary to Article 14, 16 and 21 of the Constitution of India. The following relief clause has been appended in the footnote of statement of claim as under:

It is, therefore, respectfully prayed that keeping in view the facts and circumstances narrated in the statement of claim, the termination orders dated 31-3-2014, may kindly be

quashed and the services of the petitioner may kindly be reinstated retrospectively with all consequential benefits including continuity in service, seniority, full back-wages etc. in the interest of justice and fair play.

4. The lis was resisted and contested by filing written reply on *inter-alia* preliminary objections that there is no industrial dispute as defined in section 2(k) of the Act, petitioner is not a workman as defined under section 2(s) of the Act, there is no employee and employer relationship between the petitioner and the respondents, this Tribunal is having no jurisdiction, the dispute raised by the petitioner is hopelessly barred by time and the dispute raised by the petitioner is an issue covered under Contract Labour (regulation and Abolition) Act, 1970. It is asserted that in the year 2006, 16 MW Jogini Hydroelectric Project was awarded to the respondent company by the Government of Himachal Pradesh in accordance with the policies of the State and Central Government for development and promotion of generation of electricity from small hydro power plants in the state of Himachal Pradesh and in the Country, hence, a memorandum of understanding was executed with the State of Himachal Pradesh on 27-10-2006 and after that the respondents submitted the DPR for execution of project to the Government upon which an agreement was reached between the State of H.P. and the respondents for implementation of the Project. The Project being small scale hydroelectric project would require unskilled workers for a limited period *i.e* during the construction/development stage only and once the project is commissioned, only a limited number of technical workforce is required for overseeing the O&M activities of the power plant and as such the respondents have engaged the contractors for the implementation of the project. It is further asserted that the project was executed through the contractors as the respondent company was registered under the provisions of Contract Labour (Regulation & Abolition) Act, 1970. The petitioner was engaged by M/s Vasistha Earth Works who was one of the contractors of the respondents and wages to him have also been paid by the above contractor, hence there was never a relationship of employer and employee between the petitioner and respondents and as such the petitioner has no legal right to claim employment from the respondents. Since, the work which had been awarded to the contractor M/s Vasistha Earth Works was completed, hence, the petitioner was retrenched by the contractor in accordance with law after payment of retrenchment benefits *i.e* one month's wages in lieu of retrenchment notice, retrenchment compensation and leave salary. It is also asserted that the claim of the petitioner is barred by delay as the petitioner was retrenched in the year 2014 and the matter has been referred by the appropriate government in the year 2017.

5. On merits, it is denied that the petitioner was ever working with the respondents. There is no question of retaining any junior person. The petitioner was never engaged by the replying respondent rather he was engaged by the contractor M/s Vasistha Earth Works. The petitioner has admitted that he has already been given the retrenchment notice and received retrenchment compensation. The other factum with respect of the engagement of the petitioner can only be replied by the Contractor *i.e* M/s Vasistha Earth Works. It was only after commissioning of the project, the respondent has engaged limited O&M skilled staff. There is no question of engaging any junior person as the petitioner and others have been engaged by M/s Vasistha Earth Works. The question of alleged seniority of the petitioner or other persons is also denied. It is prayed that the claim may be dismissed.

6. In rejoinder, the petitioner While controverting the averments made thereto in the reply and there by reaffirming and reiterating the contents of statement of claim.

7. On elucidating the pleading of parties, the following issues were struck down by my Learned Predecessor for its final determination *vide* Court order dated 20-9-2018.

1. Whether the demand of the petitioner regarding his reengagement in service before the management of respondents after getting his full & final dues is legal and justified?

. . .OPP.

2. If issue No.1 is proved in affirmative to what relief of service benefits the petitioner is entitled? . .*OPP.*
3. Whether the petitioner is not a workman as alleged? . .*OPR.*
4. Whether there is no relationship of employee and employer between the petitioner and the respondents, as alleged? . .*OPR.*
5. Whether the dispute raised by the petitioner is barred by time, as alleged? . .*OPR.*
6. Whether there is no cause of action available to the petitioner due to the non-impleadment of Vasistha Earth Works as alleged? . .*OPR.*
7. Whether the claim petition is not maintainable as alleged? . .*OPR.*
8. Relief

8. Henceforth, parties to the dispute were asked to adduce oral as well as documentary evidence in support of their respective claims or issues so framed.

9. I have heard the Learned Counsel for the parties and also gone through the record of the case carefully.

10. For the reasons to be recorded hereinafter, while discussing the aforesaid issues, my findings on the aforesaid issues are as follows:

<i>Issue No. 1 :</i>	<i>Yes.</i>
<i>Issue No. 2 :</i>	Entitled to reinstatement with seniority and continuity but without back-wages.
<i>Issue No. 3 :</i>	No
<i>Issue No. 4 :</i>	No
<i>Issue No. 5 :</i>	No
<i>Issue No. 6 :</i>	No
<i>Issue No. 7 :</i>	No
<i>Relief :</i>	Reference partly answered in favour of the petitioner as per operative part of the Award.

REASONS FOR FINDINGS

Issues No. 1 & 6 :

11. Both these issues are intermingled and inter connected, as mutually existed and required the common appreciation of evidence, being taken up together for the purpose of their determination and adjudication.

12. Shri Niranjana Verma, Advocate for the petitioner contended with all vehemence that the petitioner was working with the respondent continuously upto 31-3-2014, when the services of

the petitioner were terminated after giving notice and retrenchment compensation despite the fact that the respondent had retained the persons junior to him. The services of the petitioner have been terminated without following the procedure. The petitioner was working continuously with the respondent since 1-10-2010. No reasonable opportunity was afforded to the petitioner in accordance with law. Mere giving of notice is not sufficient for the purpose of disengaging the services of the petitioner, more particularly, when the work is available with the respondent. The termination of the petitioner is totally illegal and against the principles of natural justice. The action on the part of the respondent is in violation of sections 25-F, 25-G and 25-H of the Act.

13. *Per contra*, Shri Malkiyat Singh, Advocate for the petitioner strenuously argued that after the award of Hydro Electric Project to the respondent, the memorandum of understanding was executed with State of Himachal Pradesh on 27-10-2006. On detailed investigations and techno-economic studies of the project, detailed report was submitted to the Government of H.P. for execution of Project and thereafter the agreement was executed between the State and the respondent for the implementation of the project. The work was executed through different contractors. M/s Vasistha Earth Works is one of the contractor who has employed the workers for the execution of the civil work. The petitioner/claimant was engaged by M/s Vasistha Earth Works. The muster rolls were prepared and wages were also paid to the petitioner by M/s Vasistha Earth Works. At the time of retrenchment, the claimant was paid full & final retrenchment compensation by the M/s Vasistha Earth Works. He further argued that from the testimony of Shri Nirmal Kumar (RW-1) and Lachmi Dass (RW- 2), it is proved that the present workers are the workers of M/s Vasistha Earth Works, who is an independent contractor registered under the Labour Contract (Regulation & Abolition) Act. It is the liability of the independent contractor to re-employ the petitioner/claimant.

14. Learned counsel appearing on behalf of the respondent further contended that the present claim petition is not maintainable as the respondent was not the employer of the petitioner and he was engaged by the Contractor, does not fall within the ambit of the Act. It is therefore, prayed that the claim petition may kindly be dismissed.

15. I have given my best anxious considerable thought to the respective submissions of the Learned Counsel for the petitioner, as well Learned Counsel for the respondent and have also scrutinized the entire case record with minute care, caution and circumspection.

16. The petitioner namely Mohan Lal examined himself as (PW-1) and thereby reiterated the contents of the statement of claim. He was working as a helper since 1-10-2010 till 31-3-2014. The respondent had only paid PF while terminating his services. The respondent had also issued identity card (PW-1/A). He has completed 240 days in all calendar years while working with the respondent. The respondent has retained persons junior to him. There is still work in the project. The respondents are still engaging fresh hands even today. It is prayed that his termination may be quashed and set aside and he may be reinstated with all consequential benefits.

17. In cross-examination, he feigned ignorance that Vasistha Earth Works had terminated his services after paying him the retrenchment compensation. He denied that he was the worker of Vasistha Earth Works and not that of the respondent. He feigned ignorance that the entire work was got executed by the respondent from the sub-contractor and the respondent had a licence in this behalf. He admitted that the name of the contractor has been reflected as Vasistha Earth Works in (PW-1/A). He denied that he was never the employee of Ganga Dhari Hydro Power project but he was the worker of the Vasistha Earth works.

18. Conversely, Shri Nirmal Kumar Yadav, Dy. G.M Gangadhari Hydro Power Pvt. Ltd., Jogni, testified as (RW-1). He reiterated the contents of the reply thereto in verbatim. He deposed

that the project in question is a small hydro project and is presently supplying electricity to the HPSEB. During the course of executing the project the respondent Gangadhari Hydro Power Ltd., had engaged contractors for civil and electric work. The respondent had got itself registered under the H.P. Contract Labour (Regulation & Abolition) Act. The registration certificate is (RW-1/C) and the details of the contractors to whom the work was allocated is reflected in (RW-1/C). The petitioner had been engaged by Vashishtha Earth Works for the purpose of executing civil work. The wages and the muster rolls in this behalf were also prepared by the said Vasistha Earth Works. Some of the extracts showing that the muster rolls were maintained by Vasistha Earth Works are (RW-1/D) and (RW-1/E). The name of the petitioner and other workmen who have challenged their termination is reflected in the muster roll at serial number 9, 10, 12, 15, 21, 25 and 30. The petitioner had been retrenched by the contractor after the work had come to an end. As per (RW-1/F), the petitioner was paid full & final settlement by Vasistha Earth Works at the time of his retrenchment. The petitioner had received the said compensation without any protest. After the work had finished the respondent had retained the records of the contractors for the purpose of maintaining record. As of today there are only 22 staff members who have been engaged for looking after the operational and maintenance requirements of the project. Out of the aforesaid 22 staff only 10 are unskilled workers. Vasistha Works had also issued I.D Card to the workers and sought permission from the Labour Department in this behalf. The I.D Cards bears the signatures of the contractors only. The petitioner was never the worker of the respondent and he had never been terminated by the respondent. There are no persons junior to the petitioner in the engagement of the respondent Gangadhari.

19. In cross-examination, he expressed his ignorance that (PW-1/A) was an offer of appointment issued by the respondent Gangadhari. He denied that the petitioner and other workers were the employees of the respondent Gangadhari and the Identity Card had also been issued by them. He denied that the petitioner and other workers had not been retrenched by Vasistha Earth Works by the respondent. He feigned ignorance that Prem Singh, Uttam Singh, Deep Kumar, Anil Kumar, Ranvir, Bhagat Singh, Dharam Singh and Yashpal who were junior to the petitioner are still working with the respondent Gangadhari. He denied that the full & final settlement placed on record is a fraud and signatures of the petitioner are also forged. He denied that the muster rolls (RW-1/D) and (RW-1/E) are also forged and fabricated. He further denied that the petitioner was the employee of the Gangadhari and had been illegally terminated.

20. The respondent has also examined (RW-2) Shri Lachi Dass, who stated that the respondent had engaged contractors for construction, civil and electric works. There were four contractor namely Bajrang Construction, Vashistha Works, A.K Raghu and one Kali Bahadur. The petitioner had been engaged by the Vashistha Works and as a principal employer they were only supervising the work of the labour. They only used to supervise that the wages were being paid to the workers and they were the same whose names were reflected in the muster rolls. The contractor had paid them the retrenchment compensation in his presence.

21. In cross-examination he denied that (PW-1/A) bears the signatures of the management. Volunteered that the signatures are of the contractors. He admitted that the 22 workers presently working were engaged after the engagement of the petitioner. He denied that the petitioner was the employee of Vashistha Earth Works and not of Gangadhari.

22. (RW-1/A) is the copy of resolution dated 7-1-2017, authorizing Shri Nirmal Kumar Yadav to institute, defend and represent the respondent in the Court proceedings.

23. (RW-1/B) is the copy of letter dated 1-4-2014, on the subject 2×8.0 MW Jogini-SHEP-Synchronization Commissioning and achieving Commercial operation of Power House whereby final approval has been accorded to commission Jogini Power House Project to operative *w.e.f.*

27-3-2014, addressed to Chief Engineer (SO&P) HPSEB, copy of which was forwarded to the respondent M/s Gangdari Hydro Power Pvt. Ltd.

24. (RW-1/C) is the copy of details of contractors/company and work awarded/allotted in respect of Jogini SHEP whereby the work of Civil and construction at Jogini site Rampur was allotted to Vasistha Earth Works, the work of tunnel at Jogini site, Rampur was allotted to Bajrang constructions, the work of fabrication at Bhadarsh Rampur was allotted to AK Raghu and civil work at Jogini site Rampur was allotted to Kali Bahadur.

25. (RW-1/D) and (RW-1/E) are the copies of muster rolls issued by Vasista Earth Works

26. (RW-1/F) is the copy of full & final statement of the petitioner and retrenchment compensation given to the petitioner.

27. On the contrary, (PW-1/A) is the identity card issued in the name of the petitioner by Gangadhari Hydro Power (P) Ltd. and duly attested by Labour Officer Rampur Zone.

28. Before advertng to the rival legal contentions advanced on behalf of the parties, it is important to consider the relevant provisions of the Act in play in the instant case.

The Industrial Disputes Act, 1947, is:

“An act to make provision for the investigation and settlement of industrial disputes, and for certain other purposes”

Section 2(s) defines a Workman as :

“2(s). “workman” means any person (including an apprentice) employed in any industry to do any manual, unskilled, skilled, technical, operational, clerical or supervisory work for hire or reward, whether the terms of employment be express or implied, and for the purposes of any proceeding under this Act in relation to an industrial dispute, includes any such person who has been dismissed, discharge or retrenched in connection with, or as a consequence of, that dispute, or whose dismissal, discharge or retrenchment has led to that dispute, but does not include any such person-

- (i) who is subject to the Air Force Act, 1950 (45 of 1950), or the Army Act, 1950 (46 of 1950), or the Navy Act, 1957 (62 of 1957); or
- (ii) who is employed in the police service or as an officer or other employee of a prison; or
- (iii) who is employed mainly in a managerial or administrative capacity; or
- (iv) who, being employed in a supervisory capacity, draws wages exceeding [ten thousand rupees] per mensem or exercises, either by the nature of the duties attached to the office or by reason of the powers vested in him, functions mainly of a managerial nature”

Section 2(oo) lays down the concept of retrenchment as :

“Retrenchment means the termination by the employer of the service of a workman for any reason whatsoever, otherwise than as a punishment inflicted by way of disciplinary action, but does not include.—

- (a) voluntary retirement of the workman;
- (b) retirement of the workman on reaching the age of superannuation if the contract of employment between the employer and the workman concerned contains a stipulation in that behalf;
- (bb) termination of the service of the workman as a result of the non-renewal of the contract of employment between the employer and the workman concerned on its expiry or of such contract being terminated under a stipulation in that behalf contained therein;”
- (c) termination of the service of a workman on the ground of continued ill-health.”

29. On the other hand, the learned counsel appearing on behalf of the petitioner contended that the petitioner is squarely covered under the definition of “workman” under the Act.

30. I am unable to agree with the contention advanced by the learned counsel appearing on behalf of the respondent. The question “who is a workman” has been well settled by various judgments of the Hon’ble Supreme Court. In the case of H.R. Advanthaya vs. Sandoz (India) Ltd. (1997) 5 SCC 737, a Constitution Bench of the Hon’ble Supreme Court has held as under:

“..We thus have three Judge Bench decisions which have taken the view that a person to be qualified to be a workman must be doing the work which falls in any of the four categories, viz, manual, clerical, supervisory or technical and two two-judge Bench decisions which have by referring to one or the other of the said three decisions have reiterated the said law. As against this, we have three three-judge Bench decisions which have without referring to the decisions in May & Baker, WIMCO and Bunnah Shell cases (supra) have taken the other view which was expressly negated, viz., if a person does not fall within the four exceptions to the said definition he is a workman within the meaning of the ID Act. These decisions are also based on the facts found in those cases. They have, therefore, to be confined to those facts. Hence the position in law as it obtains today is that a person to be a workman under the ID Act must be employed to do the work of any of the categories, viz., manual, unskilled, skilled, technical, operational, clerical or supervisory. It is not enough that he is not covered by either of the four exceptions to the definition. We reiterate the said interpretation.”

31. It is contended on behalf of the respondent that the services of the petitioner had been engaged by the contractor on contractual basis which is purely temporary and co-terminus with the project. The services of the petitioner stood automatically terminated by issuance of retrenchment notice and by making full & final retrenchment compensation.

32. Admittedly, there is absolutely no denial to the fact that the petitioner worked as helper with the respondent w.e.f. 1-10-2010 till 31-3-2014. It is not in dispute that the respondent had time and again raised the issue that the petitioner had worked as a contractual labor with the Vasistha Earth Works as is evident from the muster roll (RW-1/D) and (RW-1/E), which is month wise attendance of the petitioner. The muster roll is the month wise attendance detail of the petitioner who has worked as helper being a contractual employee purely temporary in nature. Thus, there is evidence available on record particularly the documents (RW-1/B), the copy of letter dated 1-4-2014, it could be legitimately held that it is the respondent Gangadhari who were allotted to into 8.0 MW, Jogini State Small Hydro Power Project-Synchronization Commissioning and achieving commercial operation of Power house w.e.f. 27-3-2014. In the said letter there is no reference to M/s Vasistha Earth Works. The only case pleaded from the side of the respondent is that since the civil, construction and fabrication works were allotted by the respondent to various

contractors namely Vasistha Earth Works, Bajrang constructions, AK Raghu and Kali Bahadur and the petitioner and other workers had been engaged by contractors. It is proved on record that the petitioner had been engaged by the respondent on fixed salary of Rs. 3384/ per month. It appears that he had accepted such offer as per the full & final statement (RW-1/F). It is also admitted fact that the petitioner had worked continuously from 14-10-2010 till 10-4-2014 when the petitioner was paid full & final retrenchment compensation after giving the retrenchment notice. It is argued that such notice or compensation on account of his retrenchment was given by Vasistha Earth Works, therefore, it is Vasistha Earth Works who is responsible and not the respondent. It was vociferously argued by the petitioner that Shri Nirmal Kumar Yadav (RW-1) during his cross-examination has categorically admitted that the petitioner and other workers were issued identity cards by the respondent. He also halfheartedly feigned ignorance that the offer of appointment was issued by the respondent. He again feigned ignorance that the persons junior to the petitioner namely Prem Singh, Uttam Singh, Deep Kumar, Anil Kumar, Ranvir, Bhagat Singh, Dharam Singh and Yashpal are still working with the respondent. Thus, this admission automatically proved the case of the petitioner. The recital of the letter (RW-1/B) clearly shows that the respondent had been allotted the synchronization commissioning and achieving commercial operation of Power House. So far as concerning the engaging of various contractors to execute the work on contractual basis, it is admitted that the identity cards were issued by the respondent. The identity card (PW-1/A) clearly shows that the petitioner was the worker/employee of Gangadhari Hydro Power Project, which has been duly attested by the Labour Officer. It is the basic law that documentary evidence as compelled oral evidence, has given to weight. Thereafter, as per full & final statement (RW-1/F), the petitioner had been paid the full & final payment towards retrenchment compensation on issuance of retrenchment notice by Vasistha Earth Works whereby the petitioner was shown to be helper and joined the company since 19-10-2010. The petitioner was engaged on fixed salary of Rs. 3708/- per month and worked continuously *w.e.f.* 19-10-2010 till 31-3-2014. As discussed above, as per identity card (PW-1/A) the petitioner is shown to have been employed as helper by the respondent *w.e.f.* 1-5-2011 wherein the necessary particulars of the petitioner were duly recorded. It is manifested that only after accepting the terms and conditions of the appointment, the petitioner had been working with the respondent as helper and had continuously worked till 31-3-2014. Therefore, the entire documentary proof placed on record duly unfold that the services of the petitioner had been engaged by the respondent company.

33. The petitioner as per his pleadings and evidence on record clarified that he was relieved from his duties by issuance of retrenchment notice on making retrenchment compensation as on 31-3-2014.

34. So far as concerning the retrenchment of a workman there are certain conditions, procedure which requires to be qualified as provided under section 25-F, 25-G and 25-H of the Act, which reads as under:

25F. Conditions precedent to retrenchment of workmen.—

No workman employed in any industry who has been in continuous service for not less than one year under an employer shall be retrenched by that employer until.—

- (a) the workman has been given one month's notice in writing indicating the reasons for retrenchment and the period of notice has expired, or the workman has been paid in lieu of such notice, wages for the period of the notice:
- (b) the workman has been paid, at the time of retrenchment, compensation which shall be equivalent to fifteen days' average pay² for every completed year of continuous service] or any part thereof in excess of six months; and

- (c) notice in the prescribed manner is served on the appropriate Government³ or such authority as may be specified by the appropriate Government by notification in the Official Gazette”.

25G. Procedure for retrenchment.—Where any workman in an industrial establishment, who is a citizen of India, is to be retrenched and he belongs to a particular category of workmen in that establishment, in the absence of any agreement between the employer and the workman in this behalf, the employer shall ordinarily retrench the workman who was the last person to be employed in that category, unless for reasons to be recorded the employer retrenches any other workman.

25H. Re-employment of retrenched workmen.—Where any workmen are retrenched, and the employer proposes to take into his employ any persons, he shall, in such manner as may be prescribed, give an opportunity to the retrenched workmen who are citizens of India to offer themselves for re-employment and such retrenched workman who offer themselves for re-employment shall have preference over other persons.

Section 25-B of the Act defines continuous service.—In terms of sub section 2 of section 25-B, if a workman during a period of twelve calendar months preceding the date with reference to which calculations to be made has actually worked under the employer for a period of one year, he will deemed to be in continuous service. Admittedly, the petitioner had been working since May, 2010 till 31-3-2014, which burden of proof has been satisfactorily discharged by the petitioner that he had worked for 240 days in a calendar year which is the bench mark as settled by the Hon’ ble Apex Court in case titled R.M 2006 (1) SCC 106. Similarly, it has been laid down by the Hon’ ble Apex Court in 2019 (1) SCC 138 that when the workman had worked for required 240 days of the working in the period of twelve calendar months preceding the date of dismissal, he is entitled to take the benefit of the provisions of section 25-F of the Act.

36. It is claimed by the petitioner that at the time of termination of his services, the persons junior to him were retained by the respondent. Shri Nirmal Kumar Yadav (RW-1) had feigned ignorance that persons junior to the petitioner namely Prem Singh, Uttam Singh, Deep Kumar, Anil Kumar, Ranvir, Bhagat Singh, Dharam Singh and Yashpal are still working with the respondent. A detail of such persons is also given in the statement of claim and rejoinder that junior persons namely Prem Singh, Uttam Singh, Deep Kumar, Anil Kumar, Ranvir, Bhagat Singh, Dharam Singh and Yashpal are still working with the respondent. Though, the respondent has refuted such allegations and claimed that no persons junior to the petitioner had ever been retained. There is no iota of evidence led by the respondent before this Tribunal to prove that no person junior to the petitioner had been retained/engaged in service by the respondent. Though, no seniority list has been proved/placed on record by the petitioner but his oral evidence to the effect that persons junior to him were retained by the respondent and after his retrenchment, they are still working with the respondent. This contention of the petitioner has gone unrebutted and unchallenged, hence, the version of the petitioner that after his termination, persons junior to him were retained by the respondent has to be accepted.

37. Since, the provisions of sections 25-G and 25-H have been contravened, it was not obligatory for the petitioner to have completed 240 days in a block/calendar year. Here, I am fortified by the judgment rendered by our own Hon’ble High Court in case State of H.P. Vs. Pratap Singh, 2017 (1) HLR 286. Thus, it can be safely concluded that the respondent has contravened the provisions of section 25-G of the Act as such the termination of the services of the petitioner is held to be illegal and unjustified.

38. However, the allegations set forth from the side of the petitioner that the respondent had violated the provisions of section 25-H, to my mind does not bears to have been substantive. In

the petitioner's evidence as PW-1, he has failed to name those persons who have engaged after his retrenchment. The all material placed on record, thus, being too nebulous to lend any credence to the allegations put forth by the petitioner that new workmen were employed without affording opportunity to the petitioner being retrenched employee for such employment after the termination of the services of the petitioner. Therefore, the respondent cannot be said to have violated the provisions of section 25-H of the Act.

39. Thus, in view of my above discussion, I have no hesitation in holding that the services of the petitioner *w.e.f.* 31-3-2014 have been illegally terminated by the respondent without following the provisions of the Act. Accordingly all these issues are decided in favour of the petitioner and against the respondent.

Issue No. 2 :

40. Since, I have held under issue No.1 above that the services of the petitioner have been illegally terminated by the respondent without complying with the provisions of section 25-F and 25-G of the Act, it is ordered that he be reinstated in service with seniority and continuity. Now, the question which arises for consideration, before this Court is as to whether the petitioner is entitled to full back wages as contended by the learned counsel for the petitioner. In (2009) 1 SCC 20, Kanpur Electricity Supply Company Limited Vs. Shamim Mirza, the Hon'ble Apex Court has held that once the order of termination of services of an employee is set-aside, ordinarily, the relief of reinstatement is available to him. However, the entitlement of an employee to get reinstated does not necessarily result in payment of full or partial back-wages, which is independent of reinstatement. It has further been held by the Hon'ble Apex Court in 2010 (1) SLJ S.C 70, M/s Ritu Marbals Vs. Prabhakant Shukla that full back wages cannot be granted mechanically, upon an order of termination be declared illegal. It is further held that reinstatement must not be accompanied by payment of full back wages even for the period when the workman remained out of service and contributed little or nothing to the Industry.

41. Moreover, the petitioner was under an obligation to prove by leading cogent evidence that he was not gainfully employed after the termination of his services. The initial burden is on the workman/employee to show that she was not gainfully employed as held by the Hon'ble Apex Court in (2005) 2 Supreme Court Cases 363 titled as Kendriya Vidyalaya Sangathan and another Vs. S.C Sharma that:

16. "When, the question of determining the entitlement of a person to back-wages is concerned, the employee has to show that he was not gainfully employed. The initial burden is on him. After and if he places materials in that regard, the employer can bring on record materials to rebut the claim"

42. For the foregoing reasons, the petitioner has failed to discharge his burden by placing any material on record that he was not gainfully employed after his termination/disengagement.

43. In view of the entire evidence, on record, coupled with the rulings (*supra*), I have no hesitation in holding that the petitioner is entitled for **reinstatement in service with continuity and seniority.**

However, the petitioner is not entitled to any back-wages. Hence, this issue is decided in favour of the petitioner and against the respondent.

Issue No. 3 & 4 :

44. Being interlinked and correlated both these issues are taken up together for discussion and decision.

45. A conjoint reading of Clause G and Clause S of section 2 of the Act would clearly embarked that the workman is a person who has been employed for any manual, unskilled, skilled, technical, operational, clerical or supervisory work for hire or reward, where the terms of employment be expressed or implied and for the purpose of any proceeding under this Act in relation to an industrial dispute, includes any such person who has been dismissed, discharged or retrenched in connection with, or as a consequence of, that dispute, or whose dismissal, discharge or retrenchment has led to that dispute. Similarly, where there is in relation to an industry carried on by or under the authority of any department Government or a State Government, the authority prescribed in this behalf, or where no authority is prescribed, to be an employer. Clause (j), of the Act provides that any business, trade, undertaking, manufacture or calling of employers and includes any calling service employment, handicraft or industrial occupation or avocation of workmen shall be termed as “industry”. Therefore, as per the words embodied in clauses g, j and s of the Act, would clearly emancipate that there is a clear cut relationship of employer and employee between the petitioner and the respondent company. The identity cards were issued in the name of the Gangadhari and mere mentioning the name of its contractor M/s Vasistha Earth Works would tantamount as a camouflage and nothing else. Accordingly, both these issues are decided in favour of the petitioner and against the respondent.

Issue No. 5 :

46. In support of this issue, no evidence was led by the respondent being the legal issue. However, I have scrutinized the record of the case and observed that there is no limitation under the Industrial Disputes Act, 1947 as it was held by their lordship of **Hon'ble Supreme Court in a case reported in (1999) 6 SCC 82 incase titled as Aiyab Singh Vs. Sirhind Co-operative Marketing –cum-processing Service Society Limited and Another** in which it was held that:—

“the provisions of Article 137 of Limitation Act, 1963 are not applicable to the proceedings under the ID Act. The relief under the ID Act cannot be denied merely on the ground of delay. The plea of delay if raised by the employer is required to be proved as a matter of fact by showing the real prejudice and not as a merely hypothetical defence. No reference to the Labour Court can be generally questioned on the ground of delay alone”

47. Thus, on the strength of above ruling, it can safely be concluded that this petition is not barred by limitation. Accordingly, this issue is decided in favour of the petitioner and against the respondent.

Issue No. 7 :

48. In support of this issue, no evidence has been led by the respondent. However, the petitioner has filed this claim petition pursuant to the reference made by the appropriate government to this Court for adjudication. I find nothing wrong with this petition which is legally maintainable. Accordingly, this issue is decided in favour of the petitioner and against the respondent.

Relief :

49. As a sequel to my above discussion and findings on issues No. 1 to 7, the claim of the petitioner succeeds and is hereby partly allowed resultantly the petitioner is ordered to be **reinstatement in service forthwith with seniority and continuity**. However the petitioner is not entitled to back wages. The reference is ordered to be partly answered in favour of the petitioner and against the respondent. Let a copy of this award be communicated to the appropriate

government for publication in official gazette. File, after completion, be consigned to records. Ordered accordingly.

Announced in the open Court today this 1st day of November, 2021.

Sd/-
(RAJESH TOMAR),
Presiding Judge,
Industrial Tribunal-cum-Labour Court, Shimla.

**BEFORE SHRI RAJESH TOMAR PRESIDING JUDGE H.P. INDUSTRIAL TRIBUNAL-
CUM-LABOUR COURT, SHIMLA**

Reference Number : 26 of 2017

Instituted on : 21-2-2017

Decided on : 1-11-2021

Pawan Kumar s/o Late Shri Ganga Ram, r/o Village Jogni, P.O. Munish Bhahli, Tehsil Rampur, District Shimla, H.P. . *Petitioner.*

Versus

1. M/s Ganga Dari Hydro Project (P) Ltd., Gamba House South End Lane IV, New Shimla-9, H.P.

2. M/s Ganga Dari Hydro Project (P) Ltd. Jogni, P.O. Munish Bahali, Tehsil Rampur, District Shimla, H.P. . *Respondents.*

Reference under section 10 of the Industrial Disputes Act, 1947

For the Petitioner: Shri Niranjana Verma, Advocate

For the Respondent: Shri Malkiyat Singh, Advocate

AWARD

The following reference has been sent by the Appropriate Government for final adjudication:

“Whether demand of Shri Pawan Kumar S/o Shri Ganga Ram, Village Jogni, P.O. Munish Bahali, Tehsil Rampur, District Shimla regarding his re-engagement in service before the management of M/s Ganga Dari Hydro Power Pvt. Ltd., Gamba House South End Lane IV Phase-I, New Shimla 171009 (site office M/s Ganga Dari Hydro Power Pvt. Ltd., Jogni, P.O. Munish Bahali, Tehsil Rampur, District Shimla (H.P.) after getting his full & final dues, is legal and justified? If yes, what relief the above workman is entitled to from the above management?”

2. On receipt of reference from the Appropriate Government, notices were issued to the concerned parties in pursuance to which the petitioner has filed his statement of claim.

3. Material facts necessary for the disposal of the reference are thus that initially the petitioner was engaged by the respondent as helper on 1-1-2011 and worked continuously till 31-3-2014 when his services had been terminated after giving notice and retrenchment compensation despite the fact that his juniors namely Anil Kumar, Ranveer, Bhagat Singh, Dharam Singh and Satpal have been retained in service and even new persons have been engaged by the respondents. The services of the petitioner have been terminated without following the procedure in accordance with law, hence, the action of the respondents is in violation of sections 25-F and 25-N of the Industrial Disputes Act, 1947 (hereinafter to be referred as the Act). It is averred that before terminating the services of the petitioner no reasonable opportunity was afforded to him and mere giving the notice is not sufficient for disengaging his services. Lastly, it is averred that the termination of the petitioner is illegal and against the principles of the natural justice and contrary to Article 14, 16 and 21 of the Constitution of India. The following relief clause has been appended in the footnote of statement of claim as under:

It is, therefore, respectfully prayed that keeping in view the facts and circumstances narrated in the statement of claim, the termination orders dated 31-3-2014, may kindly be quashed and the services of the petitioner may kindly be reinstated retrospectively with all consequential benefits including continuity in service, seniority, full back-wages etc. in the interest of justice and fair play.

4. The lis was resisted and contested by filing written reply on *inter-alia* preliminary objections that there is no industrial dispute as defined in section 2(k) of the Act, petitioner is not a workman as defined under section 2(s) of the Act, there is no employee and employer relationship between the petitioner and the respondents, this Tribunal is having no jurisdiction, the dispute raised by the petitioner is hopelessly barred by time and the dispute raised by the petitioner is an issue covered under Contract Labour (regulation and Abolition) Act, 1970. It is asserted that in the year 2006, 16 MW Jogini Hydroelectric Project was awarded to the respondent company by the Government of Himachal Pradesh in accordance with the policies of the State and Central Government for development and promotion of generation of electricity from small hydro power plants in the state of Himachal Pradesh and in the Country, hence, a memorandum of understanding was executed with the State of Himachal Pradesh on 27-10-2006 and after that the respondents submitted the DPR for execution of project to the Government upon which an agreement was reached between the State of H.P. and the respondents for implementation of the Project. The Project being small scale hydroelectric project would require unskilled workers for a limited period *i.e* during the construction/development stage only and once the project is commissioned, only a limited number of technical workforce is required for overseeing the O&M activities of the power plant and as such the respondents have engaged the contractors for the implementation of the project. It is further asserted that the project was executed through the contractors as the respondent company was registered under the provisions of Contract Labour (Regulation & Abolition) Act, 1970. The petitioner was engaged by M/s Vasistha Earth Works who was one of the contractors of the respondents and wages to him have also been paid by the above contractor, hence there was never a relationship of employer and employee between the petitioner and respondents and as such the petitioner has no legal right to claim employment from the respondents. Since, the work which had been awarded to the contractor M/s Vasistha Earth Works was completed, hence, the petitioner was retrenched by the contractor in accordance with law after payment of retrenchment benefits *i.e*. one month's wages in lieu of retrenchment notice, retrenchment compensation and leave salary. It is also asserted that the claim of the petitioner is barred by delay as the petitioner was retrenched in the year 2014 and the matter has been referred by the appropriate government in the year 2017.

5. On merits, it is denied that the petitioner was ever working with the respondents. There is no question of retaining any junior person. The petitioner was never engaged by the replying respondent rather he was engaged by the contractor M/s Vasistha Earth Works. The petitioner has

admitted that he has already been given the retrenchment notice and received retrenchment compensation. The other factum with respect of the engagement of the petitioner can only be replied by the Contractor *i.e* M/s Vasistha Earth Works. It was only after commissioning of the project, the respondent has engaged limited O&M skilled staff. There is no question of engaging any junior person as the petitioner and others have been engaged by M/s Vasistha Earth Works. The question of alleged seniority of the petitioner or other persons is also denied. It is prayed that the claim may be dismissed.

6. In rejoinder, the petitioner While controverting the averments made thereto in the reply and there by reaffirming and reiterating the contents of statement of claim.

7. On elucidating the pleading of parties, the following issues were struck down by my Learned Predecessor for its final determination *vide* Court order dated 20-9-2018.

1. Whether the demand of the petitioner regarding his reengagement in service before the management of respondents after getting his full & final dues is legal and justified? . . .*OPP*.
2. If issue No.1 is proved in affirmative to what relief of service benefits the petitioner is entitled? . . .*OPP*.
3. Whether the petitioner is not a workman as alleged? . . .*OPR*.
4. Whether there is no relationship of employee and employer between the petitioner and the respondents, as alleged? . . .*OPR*.
5. Whether the dispute raised by the petitioner is barred by time, as alleged? . . .*OPR*.
6. Whether there is no cause of action available to the petitioner due to the non-impleadment of Vasistha Earth Works as alleged? . . .*OPR*.
7. Whether the claim petition is not maintainable as alleged? . . .*OPR*.
8. Relief

8. Henceforth, parties to the dispute were asked to adduce oral as well as documentary evidence in support of their respective claims or issues so framed.

9. I have heard the Learned Counsel for the parties and also gone through the record of the case carefully.

10. For the reasons to be recorded hereinafter, while discussing the aforesaid issues, my findings on the aforesaid issues are as follows:

Issue No. 1 :	Yes.
Issue No. 2 :	Entitled to reinstatement with seniority and continuity but without back-wages.
Issue No. 3 :	No
Issue No. 4 :	No

Issue No. 5 :	No
Issue No. 6 :	No
Issue No. 7 :	No
Relief :	Reference partly answered in favour of the petitioner as per operative part of the Award.

REASONS FOR FINDINGS

Issues No.1 & 6 :

11. Both these issues are intermingled and inter connected, as mutually existed and required the common appreciation of evidence, being taken up together for the purpose of their determination and adjudication.

12. Shri Niranjan Verma, Advocate for the petitioner contended with all vehemence that the petitioner was working with the respondent continuously upto 31-3-2014, when the services of the petitioner were terminated after giving notice and retrenchment compensation despite the fact that the respondent had retained the persons junior to him. The services of the petitioner have been terminated without following the procedure. The petitioner was working continuously with the respondent since 1-1-2011. No reasonable opportunity was afforded to the petitioner in accordance with law. Mere giving of notice is not sufficient for the purpose of disengaging the services of the petitioner, more particularly, when the work is available with the respondent. The termination of the petitioner is totally illegal and against the principles of natural justice. The action on the part of the respondent is in violation of sections 25-F, 25-G and 25-H of the Act.

13. *Per contra*, Shri Malkiyat Singh, Advocate for the petitioner strenuously argued that after the award of Hydro Electric Project to the respondent, the memorandum of understanding was executed with State of Himachal Pradesh on 27-10-2006. On detailed investigations and techno-economic studies of the project, detailed report was submitted to the Government of H.P. for execution of Project and thereafter the agreement was executed between the State and the respondent for the implementation of the project. The work was executed through different contractors. M/s Vasistha Earth Works is one of the contractor who has employed the workers for the execution of the civil work. The petitioner/claimant was engaged by M/s Vasistha Earth Works. The muster rolls were prepared and wages were also paid to the petitioner by M/s Vasistha Earth Works. At the time of retrenchment, the claimant was paid full & final retrenchment compensation by the M/s Vasistha Earth Works. He further argued that from the testimony of Shri Nirmal Kumar (RW-1) and Lachmi Dass (RW-2), it is proved that the present workers are the workers of M/s Vasistha Earth Works, who is an independent contractor registered under the Labour Contract (Regulation & Abolition) Act. It is the liability of the independent contractor to re-employ the petitioner/claimant.

14. Learned counsel appearing on behalf of the respondent further contended that the present claim petition is not maintainable as the respondent was not the employer of the petitioner and he was engaged by the Contractor, does not fall within the ambit of the Act. It is therefore, prayed that the claim petition may kindly be dismissed.

15. I have given my best anxious considerable thought to the respective submissions of the Learned Counsel for the petitioner, as well Learned Counsel for the respondent and have also scrutinized the entire case record with minute care, caution and circumspection.

16. The petitioner namely Pawan Kumar examined himself as (PW-1) and thereby reiterated the contents of the statement of claim. He was working as a helper since 1-1-2011 till 31-3-2014. The respondent had only paid PF while terminating his services. The respondent had also issued identity card (PW-1/A). He has completed 240 days in all calendar years while working with the respondent. The respondent has retained persons junior to him. There is still work in the project. The respondents are still engaging fresh hands even today. It is prayed that his termination may be quashed and set aside and he may be reinstated with all consequential benefits.

17. In cross-examination, he feigned ignorance that Vasistha Earth Works had terminated his services after paying him the retrenchment compensation. He denied that he was the worker of Vasistha Earth Works and not that of the respondent. He feigned ignorance that the entire work was got executed by the respondent from the sub-contractor and the respondent had a licence in this behalf. He admitted that the name of the contractor has been reflected as Vasistha Earth Works in (PW-1/A). He denied that he was never the employee of Ganga Dhari Hydro Power project but he was the worker of the Vasistha Earth works.

18. Conversely, Shri Nirmal Kumar Yadav, Dy. G.M Gangadhari Hydro Power Pvt. Ltd., Jogni, testified as (RW-1). He reiterated the contents of the reply thereto in verbatim. He deposed that the project in question is a small hydro project and is presently supplying electricity to the HPSEB. During the course of executing the project the respondent Gangadhari Hydro Power Ltd., had engaged contractors for civil and electric work. The respondent had got itself registered under the HP Contract Labour (Regulation & Abolition) Act. The registration certificate is (RW-1/C) and the details of the contractors to whom the work was allocated is reflected in (RW-1/C). The petitioner had been engaged by Vashishtha Earth Works for the purpose of executing civil work. The wages and the muster rolls in this behalf were also prepared by the said Vasistha Earth Works. Some of the extracts showing that the muster rolls were maintained by Vasistha Earth Works are (RW-1/D) and (RW-1/E). The name of the petitioner and other workmen who have challenged their termination is reflected in the muster roll at serial number 9, 10, 12, 15, 21, 25 and 30. The petitioner had been retrenched by the contractor after the work had come to an end. As per (RW-1/F), the petitioner was paid full & final settlement by Vasistha Earth Works at the time of his retrenchment. The petitioner had received the said compensation without any protest. After the work had finished the respondent had retained the records of the contractors for the purpose of maintaining record. As of today there are only 22 staff members who have been engaged for looking after the operational and maintenance requirements of the project. Out of the aforesaid 22 staff only 10 are unskilled workers. Vasistha Works had also issued I.D Card to the workers and sought permission from the Labour Department in this behalf. The I.D Cards bears the signatures of the contractors only. The petitioner was never the worker of the respondent and he had never been terminated by the respondent. There are no persons junior to the petitioner in the engagement of the respondent Gangadhari.

19. In cross-examination, he expressed his ignorance that (PW-1/A) was an offer of appointment issued by the respondent Gangadhari. He denied that the petitioner and other workers were the employees of the respondent Gangadhari and the Identity Card had also been issued by them. He denied that the petitioner and other workers had not been retrenched by Vasistha Earth Works by the respondent. He feigned ignorance that Prem Singh, Uttam Singh, Deep Kumar, Anil Kumar, Ranvir, Bhagat Singh, Dharam Singh and Yashpal who were junior to the petitioner are still working with the respondent Gangadhari. He denied that the full & final settlement placed on record is a fraud and signatures of the petitioner are also forged. He denied that the muster rolls (RW-1/D) and (RW-1/E) are also forged and fabricated. He further denied that the petitioner was the employee of the Gangadhari and had been illegally terminated.

20. The respondent has also examined (RW-2) Shri Lachi Dass, who stated that the respondent had engaged contractors for construction, civil and electric works. There were four

contractor namely Bajrang Construction, Vashistha Works, A.K Raghu and one Kali Bahadur. The petitioner had been engaged by the Vashistha Works and as a principal employer they were only supervising the work of the labour. They only used to supervise that the wages were being paid to the workers and they were the same whose names were reflected in the muster rolls. The contractor had paid them the retrenchment compensation in his presence.

21. In cross-examination he denied that (PW-1/A) bears the signatures of the management. Volunteered that the signatures are of the contractors. He admitted that the 22 workers presently working were engaged after the engagement of the petitioner. He denied that the petitioner was the employee of Vashistha Earth Works and not of Gangadhari.

22. (RW-1/A) is the copy of resolution dated 7-1-2017, authorizing Shri Nirmal Kumar Yadav to institute, defend and represent the respondent in the Court proceedings.

23. (RW-1/B) is the copy of letter dated 1-4-2014, on the subject 2×8.0 MW Jogini-SHEP-Synchronization Commissioning and achieving Commercial operation of Power House whereby final approval has been accorded to commission Jogini Power House Project to operative *w.e.f.* 27-3-2014, addressed to Chief Engineer (SO&P) HPSEB, copy of which was forwarded to the respondent M/s Gangdari Hydro Power Pvt. Ltd.

24. (RW-1/C) is the copy of details of contractors/company and work awarded/allotted in respect of Jogini SHEP whereby the work of Civil and construction at Jogini site Rampur was allotted to Vasistha Earth Works, the work of tunnel at Jogini site, Rampur was allotted to Bajrang constructions, the work of fabrication at Bhadarsh Rampur was allotted to AK Raghu and civil work at Jogini site Rampur was allotted to Kali Bahadur.

25. (RW-1/D) and (RW-1/E) are the copies of muster rolls issued by Vasista Earth Works.

26. (RW-1/F) is the copy of full & final statement of the petitioner and retrenchment compensation given to the petitioner.

27. On the contrary, (PW-1/A) is the identity card issued in the name of the petitioner by Gangadhari Hydro Power (P) Ltd. and duly attested by Labour Officer Rampur Zone.

28. Before advertng to the rival legal contentions advanced on behalf of the parties, it is important to consider the relevant provisions of the Act in play in the instant case.

The Industrial Disputes Act, 1947, is :

“An act to make provision for the investigation and settlement of industrial disputes, and for certain other purposes”

Section 2(s) defines a Workman as :

“2(s). “workman” means any person (including an apprentice) employed in any industry to do any manual, unskilled, skilled, technical, operational, clerical or supervisory work for hire or reward, whether the terms of employment be express or implied, and for the purposes of any proceeding under this Act in relation to an industrial dispute, includes any such person who has been dismissed, discharge or retrenched in connection with, or as a consequence of, that dispute, or whose dismissal, discharge or retrenchment has led to that dispute, but does not include any such person:—

- (i) who is subject to the Air Force Act, 1950 (45 of 1950), or the Army Act, 1950 (46 of 1950), or the Navy Act, 1957 (62 of 1957); or

- (ii) who is employed in the police service or as an officer or other employee of a prison; or
- (iii) who is employed mainly in a managerial or administrative capacity; or
- (iv) who, being employed in a supervisory capacity, draws wages exceeding [ten thousand rupees] per mensem or exercises, either by the nature of the duties attached to the office or by reason of the powers vested in him, functions mainly of a managerial nature.”

Section 2(oo) lays down the concept of retrenchment as:

“Retrenchment means the termination by the employer of the service of a workman for any reason whatsoever, otherwise than as a punishment inflicted by way of disciplinary action, but does not include—

- (a) voluntary retirement of the workman;
- (b) retirement of the workman on reaching the age of superannuation if the contract of employment between the employer and the workman concerned contains a stipulation in that behalf;
- (bb) termination of the service of the workman as a result of the non-renewal of the contract of employment between the employer and the workman concerned on its expiry or of such contract being terminated under a stipulation in that behalf contained therein;
- (c) termination of the service of a workman on the ground of continued ill-health.”

29. On the other hand, the learned counsel appearing on behalf of the petitioner contended that the petitioner is squarely covered under the definition of “*workman*” under the Act.

30. I am unable to agree with the contention advanced by the learned counsel appearing on behalf of the respondent. The question “who is a workman” has been well settled by various judgments of the Hon’ble Supreme Court. In the case of *H.R. Advanthaya vs. Sandoz (India) Ltd. (1997) 5 SCC 737*, a Constitution Bench of the Hon’ble Supreme Court has held as under:

“..We thus have three Judge Bench decisions which have taken the view that a person to be qualified to be a workman must be doing the work which falls in any of the four categories, viz, manual, clerical, supervisory or technical and two two-judge Bench decisions which have by referring to one or the other of the said three decisions have reiterated the said law. As against this, we have three three-judge Bench decisions which have without referring to the decisions in May & Baker, WIMCO and Bunnah Shell cases (supra) have taken the other view which was expressly negated, viz., if a person does not fall within the four exceptions to the said definition he is a workman within the meaning of the ID Act. These decisions are also based on the facts found in those cases. They have, therefore, to be confined to those facts. Hence the position in law as it obtains today is that a person to be a workman under the ID Act must be employed to do the work of any of the categories, viz., manual, unskilled, skilled, technical, operational, clerical or supervisory. It is not enough that he is not covered by either of the four exceptions to the definition. We reiterate the said interpretation.”

31. It is contended on behalf of the respondent that the services of the petitioner had been engaged by the contractor on contractual basis which is purely temporary and co-terminus with the

project. The services of the petitioner stood automatically terminated by issuance of retrenchment notice and by making full & final retrenchment compensation.

32. Admittedly, there is absolutely no denial to the fact that the petitioner worked as helper with the respondent *w.e.f.* 1-10-2011 till 31-3-2014. It is not in dispute that the respondent had time and again raised the issue that the petitioner had worked as a contractual labor with the Vasistha Earth Works as is evident from the muster roll (RW-1/D) and (RW-1/E), which is month wise attendance of the petitioner. The muster roll is the month wise attendance detail of the petitioner who has worked as helper being a contractual employee purely temporary in nature. Thus, there are evidence available on record particularly the documents (RW-1/B), the copy of letter dated 1-4-2014, it could be legitimately held that it is the respondent Gangadhari who were allotted to into 8.0 MW, Jogini State Small Hydro Power Project-Synchronization Commissioning and achieving commercial operation of Power house *w.e.f.* 27-3-2014. In the said letter there is no reference to M/s Vasistha Earth Works. The only case pleaded from the side of the respondent is that since the civil, construction and fabrication works were allotted by the respondent to various contractors namely Vasistha Earth Works, Bajrang constructions, AK Raghu and Kali Bahadur and the petitioner and other workers had been engaged by contractors. It is proved on record that the petitioner had been engaged by the respondent on fixed salary of Rs. 3384/ per month. It appears that he had accepted such offer as per the full & final statement (RW-1/F). It is also admitted fact that the petitioner had worked continuously from 1-1-2011 till 31-3-2014 when the petitioner was paid full & final retrenchment compensation after giving the retrenchment notice. It is argued that such notice or compensation on account of his retrenchment was given by Vasistha Earth Works, therefore, it is Vasistha Earth Works who is responsible and not the respondent. It was vociferously argued by the petitioner that Shri Nirmal Kumar Yadav (RW-1) during his cross-examination has categorically admitted that the petitioner and other workers were issued identity cards by the respondent. He also halfheartedly feigned ignorance that the offer of appointment was issued by the respondent. He again feigned ignorance that the persons junior to the petitioner namely Prem Singh, Uttam Singh, Deep Kumar, Anil Kumar, Ranvir, Bhagat Singh, Dharam Singh and Yashpal are still working with the respondent. Thus, this admission automatically proved the case of the petitioner. The recital of the letter (RW-1/B) clearly shows that the respondent had been allotted the synchronization commissioning and achieving commercial operation of Power House. So far as concerning the engaging of various contractors to execute the work on contractual basis, it is admitted that the identity cards were issued by the respondent. The identity card (PW-1/A) clearly shows that the petitioner was the worker/employee of Gangadhari Hydro Power Project, which has been duly attested by the Labour Officer. It is the basic law that documentary evidence as compelled oral evidence, has given to weight. Thereafter, as per full & final statement (RW-1/F), the petitioner had been paid the full & final payment towards retrenchment compensation on issuance of retrenchment notice by Vasistha Earth Works whereby the petitioner was shown to be helper and joined the company since Jan., 2011. The petitioner was engaged on fixed salary of Rs. 3384/- per month and worked continuously *w.e.f.* 1-11-2011 till 31-3-2014. As discussed above, as per identity card (PW-1/A) the petitioner is shown to have been employed as helper by the respondent *w.e.f.* 1-11-2011 wherein the necessary particulars of the petitioner were duly recorded. It is manifested that only after accepting the terms and conditions of the appointment, the petitioner had been working with the respondent as helper and had continuously worked till 31-3-2014. Therefore, the entire documentary proof placed on record duly unfold that the services of the petitioner had been engaged by the respondent company.

33. The petitioner as per his pleadings and evidence on record clarified that he was relieved from his duties by issuance of retrenchment notice on making retrenchment compensation as on 31-3-2014.

34. So far as concerning the retrenchment of a workman there are certain conditions, procedure which requires to be qualified as provided under section 25-F, 25-G and 25-H of the Act, which reads as under:

25F. Conditions precedent to retrenchment of workmen.—

No workman employed in any industry who has been in continuous service for not less than one year under an employer shall be retrenched by that employer until—

- (a) the workman has been given one month's notice in writing indicating the reasons for retrenchment and the period of notice has expired, or the workman has been paid in lieu of such notice, wages for the period of the notice:
- (b) the workman has been paid, at the time of retrenchment, compensation which shall be equivalent to fifteen days' average pay² for every completed year of continuous service or any part thereof in excess of six months; and
- (c) notice in the prescribed manner is served on the appropriate Government³ or such authority as may be specified by the appropriate Government by notification in the Official Gazette”.

25G. Procedure for retrenchment.—

Where any workman in an industrial establishment, who is a citizen of India, is to be retrenched and he belongs to a particular category of workmen in that establishment, in the absence of any agreement between the employer and the workman in this behalf, the employer shall ordinarily retrench the workman who was the last person to be employed in that category, unless for reasons to be recorded the employer retrenches any other workman.

25H. Re-employment of retrenched workmen.—

Where any workmen are retrenched, and the employer proposes to take into his employ any persons, he shall, in such manner as may be prescribed, give an opportunity to the retrenched workmen who are citizens of India to offer themselves for re-employment and such retrenched workman who offer themselves for re-employment shall have preference over other persons.

35. Section 25-B of the Act defines continuous service.—In terms of sub section 2 of section 25-B, if a workman during a period of twelve calendar months preceding the date with reference to which calculations to be made has actually worked under the employer for a period of one year, he will deemed to be in continuous service. Admittedly, the petitioner had been working since Jan. 2011 till 31-3-2014, which burden of proof has been satisfactorily discharged by the petitioner that he had worked for 240 days in a calendar year which is the bench mark as settled by the Hon'ble Apex Court in case titled R.M 2006 (1) SCC 106. Similarly, it has been laid down by the Hon'ble Apex Court in 2019 (1) SCC 138 that when the workman had worked for required 240 days of the working in the period of twelve calendar months preceding the date of dismissal, he is entitled to take the benefit of the provisions of section 25-F of the Act.

36 It is claimed by the petitioner that at the time of termination of his services, the persons junior to him were retained by the respondent. Shri Nirmal Kumar Yadav (RW-1) had feigned ignorance that persons junior to the petitioner namely Prem Singh, Uttam Singh, Deep Kumar, Anil Kumar, Ranvir, Bhagat Singh, Dharam Singh and Yashpal are still working with the respondent. A

detail of such persons is also given in the statement of claim and rejoinder that junior persons namely Prem Singh, Uttam Singh, Deep Kumar, Anil Kumar, Ranvir, Bhagat Singh, Dharam Singh and Yashpal are still working with the respondent. Though, the respondent has refuted such allegations and claimed that no persons junior to the petitioner had ever been retained. There is no iota of evidence led by the respondent before this Tribunal to prove that no person junior to the petitioner had been retained/engaged in service by the respondent. Though, no seniority list has been proved/placed on record by the petitioner but his oral evidence to the effect that persons junior to him were retained by the respondent and after his retrenchment, they are still working with the respondent. This contention of the petitioner has gone un rebutted and unchallenged, hence, the version of the petitioner that after his termination, persons junior to him were retained by the respondent has to be accepted.

37. Since, the provisions of sections 25-G and 25-H have been contravened, it was not obligatory for the petitioner to have completed 240 days in a block/calendar year. Here, I am fortified by the judgment rendered by our own Hon'ble High Court in case **State of H.P. Vs. Pratap Singh, 2017 (1) HLR 286**. Thus, it can be safely concluded that the respondent has contravened the provisions of section 25-G of the Act as such the termination of the services of the petitioner is held to be illegal and unjustified.

38. However, the allegations set forth from the side of the petitioner that the respondent had violated the provisions of section 25-H, to my mind does not bears to have been substantive. In the petitioner's evidence as (PW-1), he has failed to name those persons who have engaged after his retrenchment. The all material placed on record, thus, being too nebulous to lend any credence to the allegations put forth by the petitioner that new workmen were employed without affording opportunity to the petitioner being retrenched employee for such employment after the termination of the services of the petitioner. Therefore, the respondent cannot be said to have violated the provisions of section 25-H of the Act.

39. Thus, in view of my above discussion, I have no hesitation in holding that the services of the petitioner *w.e.f.* 31-3-2014 have been illegally terminated by the respondent without following the provisions of the Act. Accordingly all these issues are decided in favour of the petitioner and against the respondent.

Issue No. 2 :

40. Since, I have held under issue No.1 above that the services of the petitioner have been illegally terminated by the respondent without complying with the provisions of section 25-F and 25-G of the Act, it is ordered that he be reinstated in service with seniority and continuity. Now, the question which arises for consideration, before this Court is as to whether the petitioner is entitled to full back wages as contended by the learned counsel for the petitioner. In **(2009) 1 SCC 20, Kanpur Electricity Supply Company Limited Vs. Shamim Mirza**, the Hon'ble Apex Court has held that once the order of termination of services of an employee is set-aside, ordinarily, the relief of reinstatement is available to him. However, the entitlement of an employee to get reinstated does not necessarily result in payment of full or partial back-wages, which is independent of reinstatement. It has further been held by the **Hon'ble Apex Court in 2010 (1) SLJ S.C 70, M/s Ritu Marbals Vs. Prabhakant Shukla** that full back wages cannot be granted mechanically, upon an order of termination be declared illegal. It is further held that reinstatement must not be accompanied by payment of full back wages even for the period when the workman remained out of service and contributed little or nothing to the Industry.

41. Moreover, the petitioner was under an obligation to prove by leading cogent evidence that she was not gainfully employed after the termination of her services. The initial burden is on

the workman/employee to show that she was not gainfully employed as held by the **Hon' ble Apex Court in (2005) 2 Supreme Court Cases 363 titled as Kendriya Vidyalaya Sangathan and another Vs. S.C Sharma** that:

16. "When, the question of determining the entitlement of a person to back-wages is concerned, the employee has to show that he was not gainfully employed. The initial burden is on him. After and if he places materials in that regard, the employer can bring on record materials to rebut the claim"

42. For the foregoing reasons, the petitioner has failed to discharge his burden by placing any material on record that he was not gainfully employed after his termination/disengagement.

43. In view of the entire evidence, on record, coupled with the rulings (supra), I have no hesitation in holding that the petitioner is entitled for **reinstatement in service with continuity and seniority. However, the petitioner is not entitled to any back-wages.** Hence, this issue is decided in favour of the petitioner and against the respondent.

Issue No. 3 & 4 :

44. Being interlinked and correlated both these issues are taken up together for discussion and decision.

45. A conjoint reading of Clause G and Clause S of section 2 of the Act would clearly embarked that the workman is a person who has been employed for any manual, unskilled, skilled, technical, operational, clerical or supervisory work for hire or reward, where the terms of employment be expressed or implied and for the purpose of any proceeding under this Act in relation to an industrial dispute, includes any such person who has been dismissed, discharged or retrenched in connection with, or as a consequence of, that dispute, or whose dismissal, discharge or retrenchment has led to that dispute. Similarly, where there is in in relation to an industry carried on by or under the authority of any department Government or a State Government, the authority prescribed in this behalf, or where no authority is prescribed, to be an employer. Clause (j), of the Act provides that any business, trade, undertaking, manufacture or calling of employers and includes any calling service employment, handicraft or industrial occupation or avocation of workmen shall be termed as "industry". Therefore, as per the words embodied in clauses g, j and s of the Act, would clearly emancipate that there is a clear cut relationship of employer and employee between the petitioner and the respondent company. The identity cards were issued in the name of the Gangadhari and mere mentioning the name of its contractor M/s Vasistha Earth Works would tantamount as a comafauge and nothing else. Accordingly, both these issues are decided in favour of the petitioner and against the respondent.

Issue No. 5 :

46. In support of this issue, no evidence was led by the respondent being the legal issue. However, I have scrutinized the record of the case and observed that there is no limitation under the Industrial Disputes Act, 1947 as it was held by their lordship of **Hon'ble Supreme Court in a case reported in (1999) 6 SCC 82 incase titled as Ajayab Singh Vs. Sirhind Co-operative Marketing –cum-processing Service Society Limited and Another.** in which it was held that:—

"the provisions of Article 137 of Limitation Act, 1963 are not applicable to the proceedings under the ID Act. The relief under the ID Act cannot be denied merely on the ground of delay. The plea of delay if raised by the employer is required to be proved as a matter of fact by showing the real prejudice and not

as a merely hypothetical defence. No reference to the Labour Court can be generally questioned on the ground of delay alone”

47. Thus, on the strength of above ruling, it can safely be concluded that this petition is not barred by limitation. Accordingly, this issue is decided in favour of the petitioner and against the respondent.

Issue No. 7 :

48. In support of this issue, no evidence has been led by the respondent. However, the petitioner has filed this claim petition pursuant to the reference made by the appropriate government to this Court for adjudication. I find nothing wrong with this petition which is legally maintainable. Accordingly, this issue is decided in favour of the petitioner and against the respondent.

Relief :

49. As a sequel to my above discussion and findings on issues No.1 to 7, the claim of the petitioner succeeds and is hereby partly allowed resultantly the petitioner is ordered to be **reinstatement in service forthwith with seniority and continuity**. However the petitioner is not entitled to back wages. The reference is ordered to be partly answered in favour of the petitioner and against the respondent. Let a copy of this award be communicated to the appropriate government for publication in official gazette. File, after completion, be consigned to records. Ordered accordingly.

Announced in the open Court today this 1st day of November, 2021.

Sd/-
(RAJESH TOMAR),
Presiding Judge,
Industrial Tribunal-cum-Labour Court, Shimla.

**BEFORE SHRI RAJESH TOMAR PRESIDING JUDGE H.P. INDUSTRIAL TRIBUNAL-
CUM-LABOUR COURT, SHIMLA**

Reference Number : 37 of 2017

Instituted on : 2-3-2017

Decided on : 1-11-2021

Bhajan Dass s/o Late Maina Ram r/o Village & P.O Munish Bhahli, Tehsil Rampur, District Shimla, H.P. . . . *Petitioner.*

Versus

1. M/s Ganga Dari Hydro Project (P) Ltd., Gamba House South End Lane IV, New Shimla-9, H.P.
2. M/s Ganga Dari Hydro Project (P) Ltd. Jogni, P.O. Munish Bahali, Tehsil Rampur, District Shimla, H.P. . . . *Respondents.*

Reference under Section 10 of the Industrial Disputes Act, 1947

For the Petitioner : Shri Niranjana Verma, Advocate.

For the Respondent : Shri Malkiyat Singh, Advocate.

AWARD

The following reference has been sent by the Appropriate Government for final adjudication:

“Whether demand of Shri Bhajan Dass s/o Late Shri Maina Ram, Village & P.O. Munish Bahali, Tehsil Rampur, District Shimla regarding his re-engagement in service before the management of M/s Ganga Dari Hydro Power Pvt. Ltd., Gamba House South End Lane IV Phase-1, New Shimla 171009 (site office M/s Ganga Dari Hydro Power Pvt. Ltd., Jogni, P.O. Munish Bahali, Tehsil Rampur, District Shimla H.P.) after getting his full & final dues, is legal and justified? If yes, what relief the above workman is entitled to from the above management?”

2. On receipt of reference from the Appropriate Government, notices were issued to the concerned parties in pursuance to which the petitioner has filed his statement of claim.

3. Material facts necessary for the disposal of the reference are thus that initially the petitioner was engaged by the respondent as helper on 1-5-2011 and worked continuously till 31-3-2014 when his services had been terminated after giving notice and retrenchment compensation despite the fact that his juniors namely Prem Singh, Uttam Singh, Deep Kumar, Anil Kumar, Ranveer, Bhagat Singh, Dharam Singh and Yashpal have been retained in service and even new persons have been engaged by the respondents. The services of the petitioner have been terminated without following the procedure in accordance with law, hence, the action of the respondents is in violation of sections 25-F and 25-N of the Industrial Disputes Act, 1947 (hereinafter to be referred as the Act). It is averred that before terminating the services of the petitioner no reasonable opportunity was afforded to him and mere giving the notice is not sufficient for disengaging his services. Lastly, it is averred that the termination of the petitioner is illegal and against the principles of the natural justice and contrary to Article 14, 16 and 21 of the Constitution of India. The following relief clause has been appended in the footnote of statement of claim as under:

It is, therefore, respectfully prayed that keeping in view the facts and circumstances narrated in the statement of claim, the termination orders dated 31-3-2014, may kindly be quashed and the services of the petitioner may kindly be reinstated retrospectively with all consequential benefits including continuity in service, seniority, full back-wages etc. in the interest of justice and fair play.

4. The lis was resisted and contested by filing written reply on *inter-alia* preliminary objections that there is no industrial dispute as defined in section 2(k) of the Act, petitioner is not a workman as defined under section 2(s) of the Act, there is no employee and employer relationship between the petitioner and the respondents, this Tribunal is having no jurisdiction, the dispute raised by the petitioner is hopelessly barred by time and the dispute raised by the petitioner is an issue covered under Contract Labour (regulation and Abolition) Act, 1970. It is asserted that in the year 2006, 16 MW Jogini Hydroelectric Project was awarded to the respondent company by the Government of Himachal Pradesh in accordance with the policies of the State and Central Government for development and promotion of generation of electricity from small hydro power

plants in the state of Himachal Pradesh and in the Country, hence, a memorandum of understanding was executed with the State of Himachal Pradesh on 27-10-2006 and after that the respondents submitted the DPR for execution of project to the Government upon which an agreement was reached between the State of H.P. and the respondents for implementation of the Project. The Project being small scale hydroelectric project would require unskilled workers for a limited period *i.e* during the construction/development stage only and once the project is commissioned, only a limited number of technical workforce is required for overseeing the O&M activities of the power plant and as such the respondents have engaged the contractors for the implementation of the project. It is further asserted that the project was executed through the contractors as the respondent company was registered under the provisions of Contract Labour (Regulation & Abolition) Act, 1970. The petitioner was engaged by M/s Vasistha Earth Works who was one of the contractors of the respondents and wages to him have also been paid by the above contractor, hence there was never a relationship of employer and employee between the petitioner and respondents and as such the petitioner has no legal right to claim employment from the respondents. Since, the work which had been awarded to the contractor M/s Vasistha Earth Works was completed, hence, the petitioner was retrenched by the contractor in accordance with law after payment of retrenchment benefits *i.e* one month's wages in lieu of retrenchment notice, retrenchment compensation and leave salary. It is also asserted that the claim of the petitioner is barred by delay as the petitioner was retrenched in the year 2014 and the matter has been referred by the appropriate government in the year 2017.

5. On merits, it is denied that the petitioner was ever working with the respondents. There is no question of retaining any junior person. The petitioner was never engaged by the replying respondent rather he was engaged by the contractor M/s Vasistha Earth Works. The petitioner has admitted that he has already been given the retrenchment notice and received retrenchment compensation. The other factum with respect of the engagement of the petitioner can only be replied by the Contractor *i.e* M/s Vasistha Earth Works. It was only after commissioning of the project, the respondent has engaged limited O&M skilled staff. There is no question of engaging any junior person as the petitioner and others have been engaged by M/s Vasistha Earth Works. The question of alleged seniority of the petitioner or other persons is also denied. It is prayed that the claim may be dismissed.

6. In rejoinder, the petitioner While controverting the averments made thereto in the reply and there by reaffirming and reiterating the contents of statement of claim.

7. On elucidating the pleading of parties, the following issues were struck down by my Learned Predecessor for its final determination *vide* Court order dated 20-9-2018.

1. Whether the demand of the petitioner regarding his reengagement in service before the management of respondents after getting his full & final dues is legal and justified? . . .*OPP*.
2. If issue No.1 is proved in affirmative to what relief of service benefits the petitioner is entitled? *OPP*.
3. Whether the petitioner is not a workman as alleged? . . .*OPR*.
4. Whether there is no relationship of employee and employer between the petitioner and the respondents, as alleged? . . .*OPR*.
5. Whether the dispute raised by the petitioner is barred by time, as alleged? . . .*OPR*.
6. Whether there is no cause of action available to the petitioner due to the non-impleadment of Vasistha Earth Works as alleged? . . .*OPR*.

7. Whether the claim petition is not maintainable as alleged? . . . OPR.

8. Relief

8. Henceforth, parties to the dispute were asked to adduce oral as well as documentary evidence in support of their respective claims or issues so framed.

9. I have heard the Learned Counsel for the parties and also gone through the record of the case carefully.

10. For the reasons to be recorded hereinafter, while discussing the aforesaid issues, my findings on the aforesaid issues are as follows:

Issue No. : Yes

Issue No. 2: Entitled to reinstatement with seniority and continuity but without back-wages.

Issue No. 3: No

Issue No. 4: No

Issue No. 5: No

Issue No. 6: No

Issue No. 7: No

Relief: Reference partly answered in favour of the petitioner as per operative part of the Award.

REASONS FOR FINDINGS

Issues No. 1 & 6.

11. Both these issues are intermingled and inter connected, as mutually existed and required the common appreciation of evidence, being taken up together for the purpose of their determination and adjudication.

12. Shri Niranjana Verma, Advocate for the petitioner contended with all vehemence that the petitioner was working with the respondent continuously upto 31-3-2014, when the services of the petitioner were terminated after giving notice and retrenchment compensation despite the fact that the respondent had retained the persons junior to him. The services of the petitioner have been terminated without following the procedure. The petitioner was working continuously with the respondent since 1-5-2011. No reasonable opportunity was afforded to the petitioner in accordance with law. Mere giving of notice is not sufficient for the purpose of disengaging the services of the petitioner, more particularly, when the work is available with the respondent. The termination of the petitioner is totally illegal and against the principles of natural justice. The action on the part of the respondent is in violation of sections 25-F, 25-G and 25-H of the Act.

13. *Per contra*, Shri Malkiyat Singh, Advocate for the petitioner strenuously argued that after the award of Hydro Electric Project to the respondent, the memorandum of understanding was

executed with State of Himachal Pradesh on 27-10-2006. On detailed investigations and techno-economic studies of the project, detailed report was submitted to the Government of H.P. for execution of Project and thereafter the agreement was executed between the State and the respondent for the implementation of the project. The work was executed through different contractors. M/s Vasistha Earth Works is one of the contractor who has employed the workers for the execution of the civil work. The petitioner/claimant was engaged by M/s Vasistha Earth Works. The muster rolls were prepared and wages were also paid to the petitioner by M/s Vasistha Earth Works. At the time of retrenchment, the claimant was paid full & final retrenchment compensation by the M/s Vasistha Earth Works. He further argued that from the testimony of Shri Nirmal Kumar (RW-1) and Lachmi Dass (RW-2), it is proved that the present workers are the workers of M/s Vasistha Earth Works, who is an independent contractor registered under the Labour Contract (Regulation & Abolition) Act. It is the liability of the independent contractor to re-employ the petitioner/claimant.

14. Learned counsel appearing on behalf of the respondent further contended that the present claim petition is not maintainable as the respondent was not the employer of the petitioner and he was engaged by the Contractor, does not fall within the ambit of the Act. It is therefore, prayed that the claim petition may kindly be dismissed.

15. I have given my best anxious considerable thought to the respective submissions of the Learned Counsel for the petitioner, as well Learned Counsel for the respondent and have also scrutinized the entire case record with minute care, caution and circumspection.

16. The petitioner namely Bhajan Dass examined himself as (PW-1) and thereby reiterated the contents of the statement of claim. He was working as a helper since 1-5-2011 till 31-3-2014. The respondent had only paid PF while terminating his services. The respondent had also issued identity card (PW-1/A). He has completed 240 days in all calendar years while working with the respondent. The respondent has retained persons junior to him. There is still work in the project. The respondents are still engaging fresh hands even today. It is prayed that his termination may be quashed and set aside and he may be reinstated with all consequential benefits.

17. In cross-examination, he feigned ignorance that Vasistha Earth Works had terminated his services after paying him the retrenchment compensation. He denied that he was the worker of Vasistha Earth Works and not that of the respondent. He feigned ignorance that the entire work was got executed by the respondent from the sub-contractor and the respondent had a licence in this behalf. He admitted that the name of the contractor has been reflected as Vasistha Earth Works in (PW-1/A). He denied that he was never the employee of Ganga Dhari Hydro Power project but he was the worker of the Vasistha Earth works.

18. Conversely, Shri Nirmal Kumar Yadav, Dy. G.M. Gangadhari Hydro Power Pvt. Ltd., Jogni, testified as (RW-1). He reiterated the contents of the reply thereto in verbatim. He deposed that the project in question is a small hydro project and is presently supplying electricity to the HPSEB. During the course of executing the project the respondent Gangadhari Hydro Power Ltd., had engaged contractors for civil and electric work. The respondent had got itself registered under the H.P. Contract Labour (Regulation & Abolition) Act. The registration certificate is (RW-1/C) and the details of the contractors to whom the work was allocated is reflected in (RW-1/C). The petitioner had been engaged by Vashishtha Earth Works for the purpose of executing civil work. The wages and the muster rolls in this behalf were also prepared by the said Vasistha Earth Works. Some of the extracts showing that the muster rolls were maintained by Vasistha Earth Works are (RW-1/D) and (RW-1/E). The name of the petitioner and other workmen who have challenged their termination is reflected in the muster roll at serial number 9,10,12,15,21,25 and 30. The petitioner had been retrenched by the contractor after the work had come to an end. As per (RW-1/F), the

petitioner was paid full & final settlement by Vasistha Earth Works at the time of his retrenchment. The petitioner had received the said compensation without any protest. After the work had finished the respondent had retained the records of the contractors for the purpose of maintaining record. As of today there are only 22 staff members who have been engaged for looking after the operational and maintenance requirements of the project. Out of the aforesaid 22 staff only 10 are unskilled workers. Vasistha Works had also issued I.D Card to the workers and sought permission from the Labour Department in this behalf. The I.D Cards bears the signatures of the contractors only. The petitioner was never the worker of the respondent and he had never been terminated by the respondent. There are no persons junior to the petitioner in the engagement of the respondent Gangadhari.

19. In cross-examination, he expressed his ignorance that (PW-1/A) was an offer of appointment issued by the respondent Gangadhari. He denied that the petitioner and other workers were the employees of the respondent Gangadhari and the Identity Card had also been issued by them. He denied that the petitioner and other workers had not been retrenched by Vasistha Earth Works by the respondent. He feigned ignorance that Prem Singh, Uttam Singh, Deep Kumar, Anil Kumar, Ranvir, Bhagat Singh, Dharam Singh and Yashpal who were junior to the petitioner are still working with the respondent Gangadhari. He denied that the full & final settlement placed on record is a fraud and signatures of the petitioner are also forged. He denied that the muster rolls (RW-1/D) and (RW-1/E) are also forged and fabricated. He further denied that the petitioner was the employee of the Gangadhari and had been illegally terminated.

20. The respondent has also examined (RW-2) Shri Lachi Dass, who stated that the respondent had engaged contractors for construction, civil and electric works. There were four contractor namely Bajrang Construction, Vashistha Works, A.K Raghu and one Kali Bahadur. The petitioner had been engaged by the Vashistha Works and as a principal employer they were only supervising the work of the labour. They only used to supervise that the wages were being paid to the workers and they were the same whose names were reflected in the muster rolls. The contractor had paid them the retrenchment compensation in his presence.

21. In cross-examination he denied that (PW-1/A) bears the signatures of the management. Volunteered that the signatures are of the contractors. He admitted that the 22 workers presently working were engaged after the engagement of the petitioner. He denied that the petitioner was the employee of Vashistha Earth Works and not of Gangadhari.

22. (RW-1/A) is the copy of resolution dated 7-1-2017, authorizing Shri Nirmal Kumar Yadav to institute, defend and represent the respondent in the Court proceedings.

23. (RW-1/B) is the copy of letter dated 1-4-2014, on the subject 2x8.0 MW Jogini-SHEP-Synchronization Commissioning and achieving Commercial operation of Power House whereby final approval has been accorded to commission Jogini Power House Project to operative *w.e.f.* 27-3-2014, addressed to Chief Engineer (SO&P) HPSEB, copy of which was forwarded to the respondent M/s Gangdari Hydro Power Pvt. Ltd.

24. (RW-1/C) is the copy of details of contractors/company and work awarded/allotted in respect of Jogini SHEP whereby the work of Civil and construction at Jogini site Rampur was allotted to Vasistha Earth Works, the work of tunnel at Jogini site, Rampur was allotted to Bajrang constructions, the work of fabrication at Bhadarsh Rampur was allotted to AK Raghu and civil work at Jogini site Rampur was allotted to Kali Bahadur.

25. (RW-1/D) and (RW-1/E) are the copies of muster rolls issued by Vasista Earth Works.

26. (RW-1/F) is the copy of full & final statement of the petitioner and retrenchment compensation given to the petitioner.

27. On the contrary, (PW-1/A) is the identity card issued in the name of the petitioner by Gangadhari Hydro Power (P) Ltd. and duly attested by Labour Officer Rampur Zone.

28. Before adverting to the rival legal contentions advanced on behalf of the parties, it is important to consider the relevant provisions of the Act in play in the instant case.

The Industrial Disputes Act, 1947, is:

“An act to make provision for the investigation and settlement of industrial disputes, and for certain other purposes”

Section 2(s) defines a Workman as :

“2(s). “workman” means any person (including an apprentice) employed in any industry to do any manual, unskilled, skilled, technical, operational, clerical or supervisory work for hire or reward, whether the terms of employment be express or implied, and for the purposes of any proceeding under this Act in relation to an industrial dispute, includes any such person who has been dismissed, discharge or retrenched in connection with, or as a consequence of, that dispute, or whose dismissal, discharge or retrenchment has led to that dispute, but does not include any such person—

- (i) who is subject to the Air Force Act, 1950 (45 of 1950), or the Army Act, 1950 (46 of 1950), or the Navy Act, 1957 (62 of 1957); or
- (ii) who is employed in the police service or as an officer or other employee of a prison; or
- (iii) who is employed mainly in a managerial or administrative capacity; or
- (iv) who, being employed in a supervisory capacity, draws wages exceeding [ten thousand rupees] per mensem or exercises, either by the nature of the duties attached to the office or by reason of the powers vested in him, functions mainly of a managerial nature.”

Section 2(oo) lays down the concept of retrenchment as :

“Retrenchment means the termination by the employer of the service of a workman for any reason whatsoever, otherwise than as a punishment inflicted by way of disciplinary action, but does not include—

- (a) voluntary retirement of the workman;
- (b) retirement of the workman on reaching the age of superannuation if the contract of employment between the employer and the workman concerned contains a stipulation in that behalf;
- (bb) termination of the service of the workman as a result of the non-renewal of the contract of employment between the employer and the workman concerned on its expiry or of such contract being terminated under a stipulation in that behalf contained therein;”
- (c) termination of the service of a workman on the ground of continued ill-health”

29. On the other hand, the learned counsel appearing on behalf of the petitioner contended that the petitioner is squarely covered under the definition of “*workman*” under the Act.

30. I am unable to agree with the contention advanced by the learned counsel appearing on behalf of the respondent. The question “who is a workman” has been well settled by various judgments of the Hon’ble Supreme Court. In the case of **H.R. Advanthaya vs. Sandoz (India) Ltd. (1997) 5 SCC 737**, a Constitution Bench of the Hon’ble Supreme Court has held as under:

“..We thus have three Judge Bench decisions which have taken the view that a person to be qualified to be a workman must be doing the work which falls in any of the four categories, viz, manual, clerical, supervisory or technical and two two-judge Bench decisions which have by referring to one or the other of the said three decisions have reiterated the said law. As against this, we have three three-judge Bench decisions which have without referring to the decisions in May & Baker, WIMCO and Bunnah Shell cases (supra) have taken the other view which was expressly negatived, viz., if a person does not fall within the four exceptions to the said definition he is a workman within the meaning of the ID Act. These decisions are also based on the facts found in those cases. They have, therefore, to be confined to those facts. Hence the position in law as it obtains today is that a person to be a workman under the ID Act must be employed to do the work of any of the categories, viz., manual, unskilled, skilled, technical, operational, clerical or supervisory. It is not enough that he is not covered by either of the four exceptions to the definition. We reiterate the said interpretation.”

31. It is contended on behalf of the respondent that the services of the petitioner had been engaged by the contractor on contractual basis which is purely temporary and co-terminus with the project. The services of the petitioner stood automatically terminated by issuance of retrenchment notice and by making full & final retrenchment compensation.

32. Admittedly, there is absolutely no denial to the fact that the petitioner worked as helper with the respondent *w.e.f.* 14-10-2010 till 10-4-2014. It is not in dispute that the respondent had time and again raised the issue that the petitioner had worked as a contractual labor with the Vasistha Earth Works as is evident from the muster roll (RW-1/D) and (RW-1/E), which is month wise attendance of the petitioner. The muster roll is the month wise attendance detail of the petitioner who has worked as helper being a contractual employee purely temporary in nature. Thus, there is evidence available on record particularly the documents (RW-1/B), the copy of letter dated 1-4-2014, it could be legitimately held that it is the respondent Gangadhari who were allotted to into 8.0 MW, Jogini State Small Hydro Power Project- Synchronization Commissioning and achieving commercial operation of Power house *w.e.f.* 27-3-2014. In the said letter there is no reference to M/s Vasistha Earth Works. The only case pleaded from the side of the respondent is that since the civil, construction and fabrication works were allotted by the respondent to various contractors namely Vasistha Earth Works, Bajrang constructions, AK Raghu and Kali Bahadur and the petitioner and other workers had been engaged by contractors. It is proved on record that the petitioner had been engaged by the respondent on fixed salary of Rs. 3384/ per month. It appears that he had accepted such offer as per the full & final statement (RW-1/F). It is also admitted fact that the petitioner had worked continuously from 14-10-2010 till 10-4-2014 when the petitioner was paid full & final retrenchment compensation after giving the retrenchment notice. It is argued that such notice or compensation on account of his retrenchment was given by Vasistha Earth Works, therefore, it is Vasistha Earth Works who is responsible and not the respondent. It was vociferously argued by the petitioner that Shri Nirmal Kumar Yadav (RW-1) during his cross-examination has categorically admitted that the petitioner and other workers were issued identity cards by the respondent. He also halfheartedly feigned ignorance that the offer of appointment was issued by the respondent. He again feigned ignorance that the persons junior to the petitioner namely Prem Singh, Uttam Singh, Deep Kumar, Anil Kumar, Ranvir, Bhagat Singh, Dharam Singh and Yashpal are still working with the respondent. Thus, this admission automatically proved the case of the petitioner. The recital of the letter (RW-1/B) clearly shows that the respondent had been

allotted the synchronization commissioning and achieving commercial operation of Power House. So far as concerning the engaging of various contractors to execute the work on contractual basis, it is admitted that the identity cards were issued by the respondent. The identity card (PW-1/A) clearly shows that the petitioner was the worker/employee of Gangadhari Hydro Power Project, which has been duly attested by the Labour Officer. It is the basic law that documentary evidence as compelled oral evidence, has given to weight. Thereafter, as per full & final statement (RW-1/F), the petitioner had been paid the full & final payment towards retrenchment compensation on issuance of retrenchment notice by Vasistha Earth Works whereby the petitioner was shown to be helper and joined the company since 1-5-2011. The petitioner was engaged on fixed salary of Rs. 3384/- per month and worked continuously *w.e.f.* 1-5-2011 till 31-3-2014. As discussed above, as per identity card (PW- 1/A) the petitioner is shown to have been employed as helper by the respondent *w.e.f.* 1-5-2011 wherein the necessary particulars of the petitioner were duly recorded. It is manifested that only after accepting the terms and conditions of the appointment, the petitioner had been working with the respondent as helper and had continuously worked till 31-3-2014. Therefore, the entire documentary proof placed on record duly unfold that the services of the petitioner had been engaged by the respondent company.

33. The petitioner as per his pleadings and evidence on record clarified that he was relieved from his duties by issuance of retrenchment notice on making retrenchment compensation as on 31-3-2014.

34. So far as concerning the retrenchment of a workman there are certain conditions, procedure which requires to be qualified as provided under section 25-F, 25-G and 25-H of the Act, which reads as under:

25F. Conditions precedent to retrenchment of workmen.—

No workman employed in any industry who has been in continuous service for not less than one year under an employer shall be retrenched by that employer until—

- (a) the workman has been given one month's notice in writing indicating the reasons for retrenchment and the period of notice has expired, or the workman has been paid in lieu of such notice, wages for the period of the notice:
- (b) the workman has been paid, at the time of retrenchment, compensation which shall be equivalent to fifteen days' average pay² for every completed year of continuous service] or any part thereof in excess of six months; and
- (c) notice in the prescribed manner is served on the appropriate Government³ or such authority as may be specified by the appropriate Government by notification in the Official Gazette”.

25G. Procedure for retrenchment.—

Where any workman in an industrial establishment, who is a citizen of India, is to be retrenched and he belongs to a particular category of workmen in that establishment, in the absence of any agreement between the employer and the workman in this behalf, the employer shall ordinarily retrench the workman who was the last person to be employed in that category, unless for reasons to be recorded the employer retrenches any other workman.

25H. Re-employment of retrenched workmen.—

Where any workmen are retrenched, and the employer proposes to take into his employ any persons, he shall, in such manner as may be prescribed, give an opportunity to the retrenched

workmen who are citizens of India to offer themselves for re-employment and such retrenched workman who offer themselves for re-employment shall have preference over other persons.

35. **Section 25-B of the Act defines continuous service.**—In terms of sub section 2 of section 25-B, if a workman during a period of twelve calendar months preceding the date with reference to which calculations to be made has actually worked under the employer for a period of one year, he will deemed to be in continuous service. Admittedly, the petitioner had been working since May, 2010 till 31-3-2014, which burden of proof has been satisfactorily discharged by the petitioner that he had worked for 240 days in a calendar year which is the bench mark as settled by the Hon' ble Apex Court in case titled R.M 2006 (1) SCC 106. Similarly, it has been laid down by the Hon' ble Apex Court in 2019 (1) SCC 138 that when the workman had worked for required 240 days of the working in the period of twelve calendar months preceding the date of dismissal, he is entitled to take the benefit of the provisions of section 25-F of the Act.

36. It is claimed by the petitioner that at the time of termination of his services, the persons junior to him were retained by the respondent. Shri Nirmal Kumar Yadav (RW-1) had feigned ignorance that persons junior to the petitioner namely Prem Singh, Uttam Singh, Deep Kumar, Anil Kumar, Ranvir, Bhagat Singh, Dharam Singh and Yashpal are still working with the respondent. A detail of such persons is also given in the statement of claim and rejoinder that junior persons namely Prem Singh, Uttam Singh, Deep Kumar, Anil Kumar, Ranvir, Bhagat Singh, Dharam Singh and Yashpal are still working with the respondent. Though, the respondent has refuted such allegations and claimed that no persons junior to the petitioner had ever been retained. There is no iota of evidence led by the respondent before this Tribunal to prove that no person junior to the petitioner had been retained/engaged in service by the respondent. Though, no seniority list has been proved/placed on record by the petitioner but his oral evidence to the effect that persons junior to him were retained by the respondent and after his retrenchment, they are still working with the respondent. This contention of the petitioner has gone un rebutted and unchallenged, hence, the version of the petitioner that after his termination, persons junior to him were retained by the respondent has to be accepted.

37. Since, the provisions of sections 25-G and 25-H have been contravened, it was not obligatory for the petitioner to have completed 240 days in a block/calendar year. Here, I am fortified by the judgment rendered by our own Hon'ble High Court in case State of H.P. Vs. Pratap Singh, 2017 (1) HLR 286. Thus, it can be safely concluded that the respondent has contravened the provisions of section 25-G of the Act as such the termination of the services of the petitioner is held to be illegal and unjustified.

38. However, the allegations set forth from the side of the petitioner that the respondent had violated the provisions of section 25-H, to my mind does not bears to have been substantive. In the petitioner's evidence as (PW-1), he has failed to name those persons who have engaged after his retrenchment. The all material placed on record, thus, being too nebulous to lend any credence to the allegations put forth by the petitioner that new workmen were employed without affording opportunity to the petitioner being retrenched employee for such employment after the termination of the services of the petitioner. Therefore, the respondent cannot be said to have violated the provisions of section 25-H of the Act.

39. Thus, in view of my above discussion, I have no hesitation in holding that the services of the petitioner *w.e.f.* 31-3-2014 have been illegally terminated by the respondent without following the provisions of the Act. Accordingly all these issues are decided in favour of the petitioner and against the respondent.

Issue No. 2 :

40. Since, I have held under issue No.1 above that the services of the petitioner have been illegally terminated by the respondent without complying with the provisions of section 25-F and

25-G of the Act, it is ordered that he be reinstated in service with seniority and continuity. Now, the question which arises for consideration, before this Court is as to whether the petitioner is entitled to full back wages as contended by the learned counsel for the petitioner. In **(2009) 1 SCC 20, Kanpur Electricity Supply Company Limited Vs. Shamim Mirza**, the Hon'ble Apex Court has held that once the order of termination of services of an employee is set-aside, ordinarily, the relief of reinstatement is available to him. However, the entitlement of an employee to get reinstated does not necessarily result in payment of full or partial back-wages, which is independent of reinstatement. It has further been held by the **Hon'ble Apex Court in 2010 (1) SLJ S.C 70, M/s Ritu Marbals Vs. Prabhakant Shukla** that full back wages cannot be granted mechanically, upon an order of termination be declared illegal. It is further held that reinstatement must not be accompanied by payment of full back wages even for the period when the workman remained out of service and contributed little or nothing to the Industry.

41. Moreover, the petitioner was under an obligation to prove by leading cogent evidence that she was not gainfully employed after the termination of her services. The initial burden is on the workman/employee to show that she was not gainfully employed as held by the **Hon'ble Apex Court in (2005) 2 Supreme Court Cases 363 titled as Kendriya Vidyalaya Sangathan and another Vs. S.C Sharma** that:

16. "When, the question of determining the entitlement of a person to back-wages is concerned, the employee has to show that he was not gainfully employed. The initial burden is on him. After and if he places materials in that regard, the employer can bring on record materials to rebut the claim."

42. For the foregoing reasons, the petitioner has failed to discharge his burden by placing any material on record that he was not gainfully employed after his termination/disengagement.

43. In view of the entire evidence, on record, coupled with the rulings (*supra*), I have no hesitation in holding that the petitioner is entitled for **reinstatement in service with continuity and seniority. However, the petitioner is not entitled to any back-wages.** Hence, this issue is decided in favour of the petitioner and against the respondent.

Issue No. 3 & 4 :

44. Being interlinked and correlated both these issues are taken up together for discussion and decision.

45. A conjoint reading of Clause G and Clause S of section 2 of the Act would clearly embarked that the workman is a person who has been employed for any manual, unskilled, skilled, technical, operational, clerical or supervisory work for hire or reward, where the terms of employment be expressed or implied and for the purpose of any proceeding under this Act in relation to an industrial dispute, includes any such person who has been dismissed, discharged or retrenched in connection with, or as a consequence of, that dispute, or whose dismissal, discharge or retrenchment has led to that dispute. Similarly, where there is in relation to an industry carried on by or under the authority of any department Government or a State Government, the authority prescribed in this behalf, or where no authority is prescribed, to be an employer. Clause (j), of the Act provides that any business, trade, undertaking, manufacture or calling of employers and includes any calling service employment, handicraft or industrial occupation or avocation of workmen shall be termed as "industry". Therefore, as per the words embodied in clauses g, j and s of the Act, would clearly emancipate that there is a clear cut relationship of employer and employee between the petitioner and the respondent company. The identity cards were issued in the name of the Gangadhari and mere mentioning the name of its contractor M/s Vasistha Earth Works would

tantamount as a comafrauge and nothing else. Accordingly, both these issues are decided in favour of the petitioner and against the respondent.

Issue No. 5 :

46. In support of this issue, no evidence was led by the respondent being the legal issue. However, I have scrutinized the record of the case and observed that there is no limitation under the Industrial Disputes Act, 1947 as it was held by their lordship of **Hon'ble Supreme Court in a case reported in (1999) 6 SCC 82 incase titled as Ajayab Singh Vs. Sirhind Co-operative Marketing -cum-processing Service Society Limited and Another.** in which it was held that:—

“the provisions of Article 137 of Limitation Act, 1963 are not applicable to the proceedings under the ID Act. The relief under the ID Act cannot be denied merely on the ground of delay. The plea of delay if raised by the employer is required to be proved as a matter of fact by showing the real prejudice and not as a merely hypothetical defence. No reference to the Labour Court can be generally questioned on the ground of delay alone”

47. Thus, on the strength of above ruling, it can safely be concluded that this petition is not barred by limitation. Accordingly, this issue is decided in favour of the petitioner and against the respondent.

Issue No.7 :

48. In support of this issue, no evidence has been led by the respondent. However, the petitioner has filed this claim petition pursuant to the reference made by the appropriate government to this Court for adjudication. I find nothing wrong with this petition which is legally maintainable. Accordingly, this issue is decided in favour of the petitioner and against the respondent.

Relief :

49. As a sequel to my above discussion and findings on issues No.1 to 7, the claim of the petitioner succeeds and is hereby partly allowed resultantly the petitioner is ordered to be **reinstatement in service forthwith with seniority and continuity**. However the petitioner is not entitled to back wages. The reference is ordered to be partly answered in favour of the petitioner and against the respondent. Let a copy of this award be communicated to the appropriate government for publication in official gazette. File, after completion, be consigned to records. Ordered accordingly.

Announced in the open Court today this 1st day of November, 2021.

Sd/-
(RAJESH TOMAR),
Presiding Judge,
Industrial Tribunal-cum-Labour Court, Shimla.

Certified that Page No.1 to 29 of the Award have been signed by me.

Sd/-
(RAJESH TOMAR),
Presiding Judge,
Industrial Tribunal-cum-Labour Court, Shimla.

**BEFORE SHRI RAJESH TOMAR PRESIDING JUDGE HP INDUSTRIAL TRIBUNAL-
CUM-LABOUR COURT, SHIMLA**

Reference Number : 41 of 2017

Instituted on: 7-3-2017

Decided on: 1-11-2021

Balak Ram s/o Sewa Ram, r/o Village Roon, P.O. Munish Bhahli, Tehsil Rampur, District Shimla, H.P. . .Petitioner.

Versus

1. M/s Ganga Dari Hydro Project (P) Ltd., Gamba House South End Lane IV, New Shimla-9, H.P.

2. M/s Ganga Dari Hydro Project (P) Ltd. Jogni, P.O. Munish Bahali, Tehsil Rampur, District Shimla, H.P. . .Respondents.

Reference under section 10 of the Industrial Disputes Act, 1947

For the Petitioner: Shri Niranjana Verma, Advocate

For the Respondent: Shri Malkiyat Singh, Advocate

AWARD

The following reference has been sent by the Appropriate Government for final adjudication:

“Whether demand of Shri Balak Ram s/o Shri Sewa Ram, Village Roon, P.O. Munish Bahali, Tehsil Rampur District Shimla regarding his re-engagement in service before the management of M/s Ganga Dari Hydro Power Pvt. Ltd., Gamba House South End Lane IV Phase-1, New Shimla 171009 (site office M/s Ganga Dari Hydro Power Pvt. Ltd., Jogni, P.O. Munish Bahali, Tehsil Rampur, District Shimla (H.P.) after getting his full & final dues, is legal and justified? If yes, what relief the above workman is entitled to from the above management?”

2. On receipt of reference from the Appropriate Government, notices were issued to the concerned parties in pursuance to which the petitioner has filed his statement of claim.

3. Material facts necessary for the disposal of the reference are thus that initially the petitioner was engaged by the respondent as helper on 26-8-2011 and worked continuously till 31-3-2014 when his services had been terminated after giving notice and retrenchment compensation despite the fact that his juniors namely Anil Kumar, Ranveer, Bhagat Singh, Dharam Singh and Satpal have been retained in service and even new persons have been engaged by the respondents. The services of the petitioner have been terminated without following the procedure in accordance with law, hence, the action of the respondents in violation of sections 25-F and 25-N of the Industrial Disputes Act, 1947 (hereinafter to be referred as the Act). It is averred that before terminating the services of the petitioner no reasonable opportunity was afforded to him and mere giving the notice is not sufficient for disengaging his services. Lastly, it is averred that the

termination of the petitioner is illegal and against the principles of the natural justice and contrary to Article 14, 16 and 21 of the Constitution of India. The following relief clause has been appended in the footnote of statement of claim as under:

It is, therefore, respectfully prayed that keeping in view the facts and circumstances narrated in the statement of claim, the termination orders dated 31-3-2014, may kindly be quashed and the services of the petitioner may kindly be reinstated retrospectively with all consequential benefits including continuity in service, seniority, full back-wages etc. in the interest of justice and fair play.

4. The lis was resisted and contested by filing written reply on *inter-alia* preliminary objections that there is no industrial dispute as defined in section 2(k) of the Act, petitioner is not a workman as defined under section 2(s) of the Act, there is no employee and employer relationship between the petitioner and the respondents, this Tribunal is having no jurisdiction, the dispute raised by the petitioner is hopelessly barred by time and the dispute raised by the petitioner is an issue covered under Contract Labour (regulation and Abolition) Act, 1970. It is asserted that in the year 2006, 16 MW Jogini Hydroelectric Project was awarded to the respondent company by the Government of Himachal Pradesh in accordance with the policies of the State and Central Government for development and promotion of generation of electricity from small hydro power plants in the state of Himachal Pradesh and in the Country, hence, a memorandum of understanding was executed with the State of Himachal Pradesh on 27-10-2006 and after that the respondents submitted the DPR for execution of project to the Government upon which an agreement was reached between the State of H.P. and the respondents for implementation of the Project. The Project being small scale hydroelectric project would require unskilled workers for a limited period *i.e.* during the construction/development stage only and once the project is commissioned, only a limited number of technical workforce is required for overseeing the O&M activities of the power plant and as such the respondents have engaged the contractors for the implementation of the project. It is further asserted that the project was executed through the contractors as the respondent company was registered under the provisions of Contract Labour (Regulation & Abolition) Act, 1970. The petitioner was engaged by M/s Vasistha Earth Works who was one of the contractors of the respondents and wages to him have also been paid by the above contractor, hence there was never a relationship of employer and employee between the petitioner and respondents and as such the petitioner has no legal right to claim employment from the respondents. Since, the work which had been awarded to the contractor M/s Vasistha Earth Works was completed, hence, the petitioner was retrenched by the contractor in accordance with law after payment of retrenchment benefits *i.e.* one month's wages in lieu of retrenchment notice, retrenchment compensation and leave salary. It is also asserted that the claim of the petitioner is barred by delay as the petitioner was retrenched in the year 2014 and the matter has been referred by the appropriate government in the year 2017.

5. On merits, it is denied that the petitioner was ever working with the respondents. There is no question of retaining any junior person. The petitioner was never engaged by the replying respondent rather he was engaged by the contractor M/s Vasistha Earth Works. The petitioner has admitted that he has already been given the retrenchment notice and received retrenchment compensation. The other factum with respect of the engagement of the petitioner can only be replied by the Contractor *i.e.* M/s Vasistha Earth Works. It was only after commissioning of the project, the respondent has engaged limited O&M skilled staff. There is no question of engaging any junior person as the petitioner and others have been engaged by M/s Vasistha Earth Works. The question of alleged seniority of the petitioner or other persons is also denied. It is prayed that the claim may be dismissed.

6. In rejoinder, the petitioner While controverting the averments made thereto in the reply and there by reaffirming and reiterating the contents of statement of claim.

7. On elucidating the pleading of parties, the following issues were struck down by my Learned Predecessor for its final determination *vide* Court order dated 20-9-2018.

1. Whether the demand of the petitioner regarding his reengagement in service before the management of respondents after getting his full & final dues is legal and justified? . . .*OPP*.
2. If issue No. 1 is proved in affirmative to what relief of service benefits the petitioner is entitled? . . .*OPP*.
3. Whether the petitioner is not a workman as alleged? . . .*OPR*.
4. Whether there is no relationship of employee and employer between the petitioner and the respondents, as alleged? . . .*OPR*.
5. Whether the dispute raised by the petitioner is barred by time, as alleged? . . .*OPR*.
6. Whether there is no cause of action available to the petitioner due to the non-impleadment of Vasistha Earth Works as alleged? . . .*OPR*.
7. Whether the claim petition is not maintainable as alleged? . . .*OPR*.
8. Relief

8. Henceforth, parties to the dispute were asked to adduce oral as well as documentary evidence in support of their respective claims or issues so framed.

9. I have heard the Learned Counsel for the parties and also gone through the record of the case carefully.

10. For the reasons to be recorded hereinafter, while discussing the aforesaid issues, my findings on the aforesaid issues are as follows:

<i>Issue No. 1 :</i>	<i>Yes</i>
<i>Issue No. 2 :</i>	Entitled to reinstatement with seniority and continuity but without back-wages.
<i>Issue No. 3 :</i>	No
<i>Issue No. 4 :</i>	No
<i>Issue No. 5 :</i>	No
<i>Issue No. 6 :</i>	No
<i>Issue No. 7 :</i>	No
<i>Relief :</i>	Reference partly answered in favour of the petitioner as per operative part of the Award.

REASONS FOR FINDINGS

Issues No. 1 & 6 :

11. Both these issues are intermingled and inter connected, as mutually existed and required the common appreciation of evidence, being taken up together for the purpose of their determination and adjudication.

12. Shri Niranjan Verma, Advocate for the petitioner contended with all vehemence that the petitioner was working with the respondent continuously upto 31-3-2014, when the services of

the petitioner were terminated after giving notice and retrenchment compensation despite the fact that the respondent had retained the persons junior to him. The services of the petitioner have been terminated without following the procedure. The petitioner was working continuously with the respondent since 26-8-2011. No reasonable opportunity was afforded to the petitioner in accordance with law. Mere giving of notice is not sufficient for the purpose of disengaging the services of the petitioner, more particularly, when the work is available with the respondent. The termination of the petitioner is totally illegal and against the principles of natural justice. The action on the part of the respondent is in violation of sections 25-F, 25-G and 25-H of the Act.

13. *Per contra*, Shri Malkiyat Singh, Advocate for the petitioner strenuously argued that after the award of Hydro Electric Project to the respondent, the memorandum of understanding was executed with State of Himachal Pradesh on 27-10-2006. On detailed investigations and techno-economic studies of the project, detailed report was submitted to the Government of H.P. for execution of Project and thereafter the agreement was executed between the State and the respondent for the implementation of the project. The work was executed through different contractors. M/s Vasistha Earth Works is one of the contractor who has employed the workers for the execution of the civil work. The petitioner/claimant was engaged by M/s Vasistha Earth Works. The muster rolls were prepared and wages were also paid to the petitioner by M/s Vasistha Earth Works. At the time of retrenchment, the claimant was paid full & final retrenchment compensation by the M/s Vasistha Earth Works. He further argued that from the testimony of Shri Nirmal Kumar (RW-1) and Lachmi Dass (RW- 2), it is proved that the present workers are the workers of M/s Vasistha Earth Works, who is an independent contractor registered under the Labour Contract (Regulation & Abolition) Act. It is the liability of the independent contractor to re-employ the petitioner/claimant.

14. Learned counsel appearing on behalf of the respondent further contended that the present claim petition is not maintainable as the respondent was not the employer of the petitioner and he was engaged by the Contractor, does not fall within the ambit of the Act. It is therefore, prayed that the claim petition may kindly be dismissed.

15. I have given my best anxious considerable thought to the respective submissions of the Learned Counsel for the petitioner, as well Learned Counsel for the respondent and have also scrutinized the entire case record with minute care, caution and circumspection.

16. The petitioner namely Balak Ram examined himself as (PW-1) and thereby reiterated the contents of the statement of claim. He was working as a helper since 26-8-2011 till 31-3-2014. The respondent had only paid PF while terminating his services. The respondent had also issued identity card (PW-1/A). He has completed 240 days in all calendar years while working with the respondent. The respondent has retained persons junior to him. There is still work in the project. The respondents are still engaging fresh hands even today. It is prayed that his termination may be quashed and set aside and he may be reinstated with all consequential benefits.

17. In cross-examination, he feigned ignorance that Vasistha Earth Works had terminated his services after paying him the retrenchment compensation. He denied that he was the worker of Vasistha Earth Works and not that of the respondent. He feigned ignorance that the entire work was got executed by the respondent from the sub-contractor and the respondent had a licence in this behalf. He admitted that the name of the contractor has been reflected as Vasistha Earth Works in (PW-1/A). He denied that he was never the employee of Ganga Dhari Hydro Power project but he was the worker of the Vasistha Earth works.

18. Conversely, Shri Nirmal Kumar Yadav, Dy. G.M Gangadhari Hydro Power Pvt. Ltd., Jogni, testified as (RW-1). He reiterated the contents of the reply thereto in verbatim. He deposed

that the project in question is a small hydro project and is presently supplying electricity to the HPSEB. During the course of executing the project the respondent Gangadhari Hydro Power Ltd., had engaged contractors for civil and electric work. The respondent had got itself registered under the H.P. Contract Labour (Regulation & Abolition) Act. The registration certificate is (RW-1/C) and the details of the contractors to whom the work was allocated is reflected in (RW-1/C). The petitioner had been engaged by Vashishtha Earth Works for the purpose of executing civil work. The wages and the muster rolls in this behalf were also prepared by the said Vasistha Earth Works. Some of the extracts showing that the muster rolls were maintained by Vasistha Earth Works are (RW-1/D) and (RW-1/E). The name of the petitioner and other workmen who have challenged their termination is reflected in the muster roll at serial number 9, 10, 12, 15, 21, 25 and 30. The petitioner had been retrenched by the contractor after the work had come to an end. As per (RW-1/F), the petitioner was paid full & final settlement by Vasistha Earth Works at the time of his retrenchment. The petitioner had received the said compensation without any protest. After the work had finished the respondent had retained the records of the contractors for the purpose of maintaining record. As of today there are only 22 staff members who have been engaged for looking after the operational and maintenance requirements of the project. Out of the aforesaid 22 staff only 10 are unskilled workers. Vasistha Works had also issued I.D. Card to the workers and sought permission from the Labour Department in this behalf. The I.D Cards bears the signatures of the contractors only. The petitioner was never the worker of the respondent and he had never been terminated by the respondent. There are no persons junior to the petitioner in the engagement of the respondent Gangadhari.

19. In cross-examination, he expressed his ignorance that (PW-1/A) was an offer of appointment issued by the respondent Gangadhari. He denied that the petitioner and other workers were the employees of the respondent Gangadhari and the Identity Card had also been issued by them. He denied that the petitioner and other workers had not been retrenched by Vasistha Earth Works by the respondent. He feigned ignorance that Prem Singh, Uttam Singh, Deep Kumar, Anil Kumar, Ranvir, Bhagat Singh, Dharam Singh and Yashpal who were junior to the petitioner are still working with the respondent Gangadhari. He denied that the full & final settlement placed on record is a fraud and signatures of the petitioner are also forged. He denied that the muster rolls (RW-1/D) and (RW-1/E) are also forged and fabricated. He further denied that the petitioner was the employee of the Gangadhari and had been illegally terminated.

20. The respondent has also examined (RW-2) Shri Lachi Dass, who stated that the respondent had engaged contractors for construction, civil and electric works. There were four contractor namely Bajrang Construction, Vashistha Works, A.K Raghu and one Kali Bahadur. The petitioner had been engaged by the Vashistha Works and as a principal employer they were only supervising the work of the labour. They only used to supervise that the wages were being paid to the workers and they were the same whose names were reflected in the muster rolls. The contractor had paid them the retrenchment compensation in his presence.

21. In cross-examination he denied that (PW-1/A) bears the signatures of the management. Volunteered that the signatures are of the contractors. He admitted that the 22 workers presently working were engaged after the engagement of the petitioner. He denied that the petitioner was the employee of Vashistha Earth Works and not of Gangadhari.

22. (RW-1/A) is the copy of resolution dated 7-1-2017, authorizing Shri Nirmal Kumar Yadav to institute, defend and represent the respondent in the Court proceedings.

23. (RW-1/B) is the copy of letter dated 1-4-2014, on the subject 2x8.0 MW Jogini-SHEP-Synchronization Commissioning and achieving Commercial operation of Power House whereby final approval has been accorded to commission Jogini Power House Project to operative *w.e.f.*

27-3-2014, addressed to Chief Engineer (SO&P) HPSEB, copy of which was forwarded to the respondent M/s Gangdari Hydro Power Pvt. Ltd.

24. (RW-1/C) is the copy of details of contractors/company and work awarded/allotted in respect of Jogini SHEP whereby the work of Civil and construction at Jogini site Rampur was allotted to Vasistha Earth Works, the work of tunnel at Jogini site, Rampur was allotted to Bajrang constructions, the work of fabrication at Bhadarsh Rampur was allotted to AK Raghu and civil work at Jogini site Rampur was allotted to Kali Bahadur.

25. (RW-1/D) and (RW-1/E) are the copies of muster rolls issued by Vasista Earth Works

26. (RW-1/F) is the copy of full & final statement of the petitioner and retrenchment compensation given to the petitioner.

27. On the contrary, (PW-1/A) is the identity card issued in the name of the petitioner by Gangadhari Hydro Power (P) Ltd. and duly attested by Labour Officer Rampur Zone.

28. Before advertng to the rival legal contentions advanced on behalf of the parties, it is important to consider the relevant provisions of the Act in play in the instant case.

The Industrial Disputes Act, 1947, is :

“An act to make provision for the investigation and settlement of industrial disputes, and for certain other purposes”

Section 2(s) defines a Workman as :

“2(s). “workman” means any person (including an apprentice) employed in any industry to do any manual, unskilled, skilled, technical, operational, clerical or supervisory work for hire or reward, whether the terms of employment be express or implied, and for the purposes of any proceeding under this Act in relation to an industrial dispute, includes any such person who has been dismissed, discharge or retrenched in connection with, or as a consequence of, that dispute, or whose dismissal, discharge or retrenchment has led to that dispute, but does not include any such person—

- (i) who is subject to the Air Force Act, 1950 (45 of 1950), or the Army Act, 1950 (46 of 1950), or the Navy Act, 1957 (62 of 1957); or
- (ii) who is employed in the police service or as an officer or other employee of a prison; or
- (iii) who is employed mainly in a managerial or administrative capacity; or
- (iv) who, being employed in a supervisory capacity, draws wages exceeding (ten thousand rupees) per mensem or exercises, either by the nature of the duties attached to the office or by reason of the powers vested in him, functions mainly of a managerial nature.”

Section 2(oo) lays down the concept of retrenchment as :

“Retrenchment means the termination by the employer of the service of a workman for any reason whatsoever, otherwise than as a punishment inflicted by way of disciplinary action, but does not include—

- (a) voluntary retirement of the workman;
- (b) retirement of the workman on reaching the age of superannuation if the contract of employment between the employer and the workman concerned contains a stipulation in that behalf;
- (bb) termination of the service of the workman as a result of the non-renewal of the contract of employment between the employer and the workman concerned on its expiry or of such contract being terminated under a stipulation in that behalf contained therein;
- (c) termination of the service of a workman on the ground of continued ill-health.”

29. On the other hand, the learned counsel appearing on behalf of the petitioner contended that the petitioner is squarely covered under the definition of “workman” under the Act.

30. I am unable to agree with the contention advanced by the learned counsel appearing on behalf of the respondent. The question “who is a workman” has been well settled by various judgments of the Hon’ble Supreme Court. In the case of H.R. Advanthaya vs. Sandoz (India) Ltd. (1997) 5 SCC 737, a Constitution Bench of the Hon’ble Supreme Court has held as under:

“..We thus have three Judge Bench decisions which have taken the view that a person to be qualified to be a workman must be doing the work which falls in any of the four categories, viz, manual, clerical, supervisory or technical and two two-judge Bench decisions which have by referring to one or the other of the said three decisions have reiterated the said law. As against this, we have three three-judge Bench decisions which have without referring to the decisions in May & Baker, WIMCO and Bunnah Shell cases (supra) have taken the other view which was expressly negated, viz., if a person does not fall within the four exceptions to the said definition he is a workman within the meaning of the ID Act. These decisions are also based on the facts found in those cases. They have, therefore, to be confined to those facts. Hence the position in law as it obtains today is that a person to be a workman under the ID Act must be employed to do the work of any of the categories, viz., manual, unskilled, skilled, technical, operational, clerical or supervisory. It is not enough that he is not covered by either of the four exceptions to the definition. We reiterate the said interpretation.”

31. It is contended on behalf of the respondent that the services of the petitioner had been engaged by the contractor on contractual basis which is purely temporary and co-terminus with the project. The services of the petitioner stood automatically terminated by issuance of retrenchment notice and by making full & final retrenchment compensation.

32. Admittedly, there is absolutely no denial to the fact that the petitioner worked as helper with the respondent w.e.f. 26-7-2011 till 31-3-2014. It is not in dispute that the respondent had time and again raised the issue that the petitioner had worked as a contractual labor with the Vasistha Earth Works as is evident from the muster roll (RW-1/D) and (RW-1/E), which is month wise attendance of the petitioner. The muster roll is the month wise attendance detail of the petitioner who has worked as helper being a contractual employee purely temporary in nature. Thus, there is evidence available on record particularly the documents (RW-1/B), the copy of letter dated 1-4-2014, it could be legitimately held that it is the respondent Gangadhari who were allotted to into 8.0 MW, Jogini State Small Hydro Power Project- Synchronization Commissioning and achieving commercial operation of Power house w.e.f. 27-3-2014. In the said letter there is no reference to M/s Vasistha Earth Works. The only case pleaded from the side of the respondent is that since the civil, construction and fabrication works were allotted by the respondent to various

contractors namely Vasistha Earth Works, Bajrang constructions, AK Raghu and Kali Bahadur and the petitioner and other workers had been engaged by contractors. It is proved on record that the petitioner had been engaged by the respondent on fixed salary of Rs. 3384/ per month. It appears that he had accepted such offer as per the full & final statement (RW-1/F). It is also admitted fact that the petitioner had worked continuously from 26-7-2011 till 31-3-2014 when the petitioner was paid full & final retrenchment compensation after giving the retrenchment notice. It is argued that such notice or compensation on account of his retrenchment was given by Vasistha Earth Works, therefore, it is Vasistha Earth Works who is responsible and not the respondent. It was vociferously argued by the petitioner that Shri Nirmal Kumar Yadav (RW-1) during his cross-examination has categorically admitted that the petitioner and other workers were issued identity cards by the respondent. He also halfheartedly feigned ignorance that the offer of appointment was issued by the respondent. He again feigned ignorance that the persons junior to the petitioner namely Prem Singh, Uttam Singh, Deep Kumar, Anil Kumar, Ranvir, Bhagat Singh, Dharam Singh and Yashpal are still working with the respondent. Thus, this admission automatically proved the case of the petitioner. The recital of the letter (RW-1/B) clearly shows that the respondent had been allotted the synchronization commissioning and achieving commercial operation of Power House. So far as concerning the engaging of various contractors to execute the work on contractual basis, it is admitted that the identity cards were issued by the respondent. The identity card (PW-1/A) clearly shows that the petitioner was the worker/employee of Gangadhari Hydro Power Project, which has been duly attested by the Labour Officer. It is the basic law that documentary evidence as compelled oral evidence, has given to weight. Thereafter, as per full & final statement (RW-1/F), the petitioner had been paid the full & final payment towards retrenchment compensation on issuance of retrenchment notice by Vasistha Earth Works whereby the petitioner was shown to be helper and joined the company since 26-7-2011. The petitioner was engaged on fixed salary of Rs. 3384/- per month and worked continuously *w.e.f.* 26-7-2011 till 31-3-2014. As discussed above, as per identity card (PW-1/A) the petitioner is shown to have been employed as helper by the respondent wherein the necessary particulars of the petitioner were duly recorded. It is manifested that only after accepting the terms and conditions of the appointment, the petitioner had been working with the respondent as helper and had continuously worked till 31-3-2014. Therefore, the entire documentary proof placed on record duly unfold that the services of the petitioner had been engaged by the respondent company.

33. The petitioner as per his pleadings and evidence on record clarified that he was relieved from his duties by issuance of retrenchment notice on making retrenchment compensation as on 31-3-2014.

34. So far as concerning the retrenchment of a workman there are certain conditions, procedure which requires to be qualified as provided under section 25-F, 25-G and 25-H of the Act, which reads as under:

25F. Conditions precedent to retrenchment of workmen.—

No workman employed in any industry who has been in continuous service for not less than one year under an employer shall be retrenched by that employer until—

- (a) the workman has been given one month's notice in writing indicating the reasons for retrenchment and the period of notice has expired, or the workman has been paid in lieu of such notice, wages for the period of the notice:
- (b) the workman has been paid, at the time of retrenchment, compensation which shall be equivalent to fifteen days' average pay² for every completed year of continuous service or any part thereof in excess of six months; and

- (c) notice in the prescribed manner is served on the appropriate Government³ or such authority as may be specified by the appropriate Government by notification in the Official Gazette”.

25G. Procedure for retrenchment.—

Where any workman in an industrial establishment, who is a citizen of India, is to be retrenched and he belongs to a particular category of workmen in that establishment, in the absence of any agreement between the employer and the workman in this behalf, the employer shall ordinarily retrench the workman who was the last person to be employed in that category, unless for reasons to be recorded the employer retrenches any other workman.

25H. Re-employment of retrenched workmen.—

Where any workmen are retrenched, and the employer proposes to take into his employ any persons, he shall, in such manner as may be prescribed, give an opportunity to the retrenched workmen who are citizens of India to offer themselves for re-employment and such retrenched workman who offer themselves for re-employment shall have preference over other persons.

35. **Section 25-B of the Act defines continuous service.** In terms of sub section 2 of Section 25-B, if a workman during a period of twelve calendar months preceding the date with reference to which calculations to be made has actually worked under the employer for a period of one year, he will deemed to be in continuous service. Admittedly, the petitioner had been working since 26-7-2011 till 31-3-2014, which burden of proof has been satisfactorily discharged by the petitioner that he had worked for 240 days in a calendar year which is the bench mark as settled by the Hon’ble Apex Court in case titled R.M 2006 (1) SCC 106. Similarly, it has been laid down by the Hon’ble Apex Court in 2019 (1) SCC 138 that when the workman had worked for required 240 days of the working in the period of twelve calendar months preceding the date of dismissal, he is entitled to take the benefit of the provisions of section 25-F of the Act.

36. It is claimed by the petitioner that at the time of termination of his services, the persons junior to him were retained by the respondent. Shri Nirmal Kumar Yadav (RW-1) had feigned ignorance that persons junior to the petitioner namely Prem Singh, Uttam Singh, Deep Kumar, Anil Kumar, Ranvir, Bhagat Singh, Dharam Singh and Yashpal are still working with the respondent. A detail of such persons is also given in the statement of claim and rejoinder that junior persons namely Prem Singh, Uttam Singh, Deep Kumar, Anil Kumar, Ranvir, Bhagat Singh, Dharam Singh and Yashpal are still working with the respondent. Though, the respondent has refuted such allegations and claimed that no persons junior to the petitioner had ever been retained. There is no iota of evidence led by the respondent before this Tribunal to prove that no person junior to the petitioner had been retained/engaged in service by the respondent. Though, no seniority list has been proved/placed on record by the petitioner but his oral evidence to the effect that persons junior to him were retained by the respondent and after his retrenchment, they are still working with the respondent. This contention of the petitioner has gone un rebutted and unchallenged, hence, the version of the petitioner that after his termination, persons junior to him were retained by the respondent has to be accepted.

37. Since, the provisions of sections 25-G and 25-H have been contravened, it was not obligatory for the petitioner to have completed 240 days in a block/calendar year. Here, I am fortified by the judgment rendered by our own Hon’ble High Court in case State of H.P. Vs. Pratap Singh, 2017 (1) HLR 286. Thus, it can be safely concluded that the respondent has contravened the provisions of Section 25-G of the Act as such the termination of the services of the petitioner is held to be illegal and unjustified.

38. However, the allegations set forth from the side of the petitioner that the respondent had violated the provisions of section 25-H, to my mind does not bears to have been substantive. In the petitioner's evidence as (PW-1), he has failed to name those persons who have engaged after his retrenchment. The all material placed on record, thus, being too nebulous to lend any credence to the allegations put forth by the petitioner that new workmen were employed without affording opportunity to the petitioner being retrenched employee for such employment after the termination of the services of the petitioner. Therefore, the respondent cannot be said to have violated the provisions of section 25-H of the Act.

39. Thus, in view of my above discussion, I have no hesitation in holding that the services of the petitioner *w.e.f.* 31-3-2014 have been illegally terminated by the respondent without following the provisions of the Act. Accordingly all these issues are decided in favour of the petitioner and against the respondent.

Issue No.2 :

40. Since, I have held under issue No.1 above that the services of the petitioner have been illegally terminated by the respondent without complying with the provisions of Section 25-F and 25-G of the Act, it is ordered that he be reinstated in service with seniority and continuity. Now, the question which arises for consideration, before this Court is as to whether the petitioner is entitled to full back wages as contended by the learned counsel for the petitioner. In (2009) 1 SCC 20, Kanpur Electricity Supply Company Limited Vs. Shamim Mirza, the Hon'ble Apex Court has held that once the order of termination of services of an employee is set-aside, ordinarily, the relief of reinstatement is available to him. However, the entitlement of an employee to get reinstated does not necessarily result in payment of full or partial back-wages, which is independent of reinstatement. It has further been held by the Hon' ble Apex Court in 2010 (1) SLJ S.C 70, M/s Ritu Marbals Vs. Prabhakant Shukla that full back wages cannot be granted mechanically, upon an order of termination be declared illegal. It is further held that reinstatement must not be accompanied by payment of full back wages even for the period when the workman remained out of service and contributed little or nothing to the Industry.

41. Moreover, the petitioner was under an obligation to prove by leading cogent evidence that he was not gainfully employed after the termination of his services. The initial burden is on the workman/employee to show that he was not gainfully employed as held by the Hon' ble Apex Court in (2005) 2 Supreme Court Cases 363 titled as Kendriya Vidyalaya Sangathan and another Vs. S.C Sharma that:

16. "When, the question of determining the entitlement of a person to back-wages is concerned, the employee has to show that he was not gainfully employed. The initial burden is on him. After and if he places materials in that regard, the employer can bring on record materials to rebut the claim"

42. For the foregoing reasons, the petitioner has failed to discharge his burden by placing any material on record that he was not gainfully employed after his termination/disengagement.

43. In view of the entire evidence, on record, coupled with the rulings (*supra*), I have no hesitation in holding that the petitioner is entitled for **reinstatement in service with continuity and seniority. However, the petitioner is not entitled to any back-wages.** Hence, this issue is decided in favour of the petitioner and against the respondent.

Issue No.3 & 4 :

44. Being interlinked and correlated both these issues are taken up together for discussion and decision.

45. A conjoint reading of Clause G and Clause S of section 2 of the Act would clearly embarked that the workman is a person who has been employed for any manual, unskilled, skilled, technical, operational, clerical or supervisory work for hire or reward, where the terms of employment be expressed or implied and for the purpose of any proceeding under this Act in relation to an industrial dispute, includes any such person who has been dismissed, discharged or retrenched in connection with, or as a consequence of, that dispute, or whose dismissal, discharge or retrenchment has led to that dispute. Similarly, where there is in in relation to an industry carried on by or under the authority of any department Government or a State Government, the authority prescribed in this behalf, or where no authority is prescribed, to be an employer. Clause (j), of the Act provides that any business, trade, undertaking, manufacture or calling of employers and includes any calling service employment, handicraft or industrial occupation or avocation of workmen shall be termed as “industry”. Therefore, as per the words embodied in Clauses g, j and s of the Act, would clearly emancipate that there is a clear cut relationship of employer and employee between the petitioner and the respondent company. The identity cards were issued in the name of the Gangadhari and mere mentioning the name of its contractor M/s Vasistha Earth Works would tantamount as a comafauge and nothing else. Accordingly, both these issues are decided in favour of the petitioner and against the respondent.

Issue No. 5 :

46. In support of this issue, no evidence was led by the respondent being the legal issue. However, I have scrutinized the record of the case and observed that there is no limitation under the Industrial Disputes Act, 1947 as it was held by their lordship of **Hon'ble Supreme Court in a case reported in (1999) 6 SCC 82 incase titled as *Ajayab Singh Vs. Sirhind Co-operative Marketing -cum-processing Service Society Limited and Another.* in which it was held that:—**

“the provisions of Article 137 of Limitation Act, 1963 are not applicable to the proceedings under the ID Act. The relief under the ID Act cannot be denied merely on the ground of delay. The plea of delay if raised by the employer is required to be proved as a matter of fact by showing the real prejudice and not as a merely hypothetical defence. No reference to the Labour Court can be generally questioned on the ground of delay alone”

47. Thus, on the strength of above ruling, it can safely be concluded that this petition is not barred by limitation. Accordingly, this issue is decided in favour of the petitioner and against the respondent.

Issue No.7 :

48. In support of this issue, no evidence has been led by the respondent. However, the petitioner has filed this claim petition pursuant to the reference made by the appropriate government to this Court for adjudication. I find nothing wrong with this petition which is legally maintainable. Accordingly, this issue is decided in favour of the petitioner and against the respondent.

Relief :

49. As a sequel to my above discussion and findings on issues no.1 to 7, the claim of the petitioner succeeds and is hereby partly allowed resultantly the petitioner is ordered to be **reinstatement in service forthwith with seniority and continuity**. However the petitioner is not entitled to back wages. The reference is ordered to be partly answered in favour of the petitioner and against the respondent. Let a copy of this award be communicated to the appropriate

government for publication in official gazette. File, after completion, be consigned to records. Ordered accordingly.

Announced in the open Court today this 1st day of November, 2021.

Sd/-
(RAJESH TOMAR),
Presiding Judge,
Industrial Tribunal-cum-Labour Court, Shimla.

**BEFORE SHRI RAJESH TOMAR PRESIDING JUDGE H.P. INDUSTRIAL TRIBUNAL-
CUM-LABOUR COURT, SHIMLA**

Reference Number : 42 of 2017

Instituted on : 7-3-2017

Decided on : 1-11-2021

Sat Pal Singh s/o Bhajan Dass, r/o Village Jogni, P.O. Munish Bahali, Tehsil Rampur,
District Shimla, H.P. . *Petitioner.*

Versus

1. M/s Ganga Dari Hydro Project (P) Ltd., Gamba House South End Lane IV, New Shimla-9, H.P.

2. M/s Ganga Dari Hydro Project (P) Ltd. Jogni, P.O. Munish Bahali, Tehsil Rampur,
District Shimla, H.P. . *Respondents.*

Reference under section 10 of the Industrial Disputes Act, 1947

For the Petitioner: Shri Niranjana Verma, Advocate

For the Respondent: Shri Malkiyat Singh, Advocate

AWARD

The following reference has been sent by the Appropriate Government for final adjudication:

“Whether demand of Shri Satpal Singh s/o Shri Bhajan Dass, Village Jogni, P.O. Munish Bahali, Tehsil Rampur, District Shimla regarding his re-engagement in service before the management of M/s Ganga Dari Hydro Power Pvt. Ltd., Gamba House South End Lane IV Phase-I, New Shimla 171009 (site office M/s Ganga Dari Hydro Power Pvt. Ltd., Jogni, P.O. Munish Bahali, Tehsil Rampur, District Shimla (H.P.) after getting his full & final dues, is legal and justified? If yes, what relief the above workman is entitled to from the above management?”

2. On receipt of reference from the Appropriate Government, notices were issued to the concerned parties in pursuance to which the petitioner has filed his statement of claim.

3. Material facts necessary for the disposal of the reference are thus that initially the petitioner was engaged by the respondent as helper on 14-10-2010 and worked continuously till 10-4-2014 when his services had been terminated after giving notice and retrenchment compensation despite the fact that his juniors namely Prem Singh, Uttam Singh, Deep Kumar, Anil Kumar, Ranveer, Bhagat Singh, Dharam Singh and Yashpal have been retained in service and even new persons have been engaged by the respondents. The services of the petitioner have been terminated without following the procedure in accordance with law, hence, the action of the respondents is in violation of sections 25-F and 25-N of the Industrial Disputes Act, 1947 (hereinafter to be referred as the Act). It is averred that before terminating the services of the petitioner no reasonable opportunity was afforded to him and mere giving the notice is not sufficient for disengaging his services. Lastly, it is averred that the termination of the petitioner is illegal and against the principles of the natural justice and contrary to Article 14, 16 and 21 of the Constitution of India. The following relief clause has been appended in the footnote of statement of claim as under:

It is, therefore, respectfully prayed that keeping in view the facts and circumstances narrated in the statement of claim, the termination orders dated 31-3-2014, may kindly be quashed and the services of the petitioner may kindly be reinstated retrospectively with all consequential benefits including continuity in service, seniority, full back-wages etc. in the interest of justice and fair play.

4. The lis was resisted and contested by filing written reply on *inter-alia* preliminary objections that there is no industrial dispute as defined in section 2(k) of the Act, petitioner is not a workman as defined under section 2(s) of the Act, there is no employee and employer relationship between the petitioner and the respondents, this Tribunal is having no jurisdiction, the dispute raised by the petitioner is hopelessly barred by time and the dispute raised by the petitioner is an issue covered under Contract Labour (regulation and Abolition) Act, 1970. It is asserted that in the year 2006, 16 MW Jogini Hydroelectric Project was awarded to the respondent company by the Government of Himachal Pradesh in accordance with the policies of the State and Central Government for development and promotion of generation of electricity from small hydro power plants in the state of Himachal Pradesh and in the Country, hence, a memorandum of understanding was executed with the State of Himachal Pradesh on 27-10-2006 and after that the respondents submitted the DPR for execution of project to the Government upon which an agreement was reached between the State of H.P. and the respondents for implementation of the Project. The Project being small scale hydroelectric project would require unskilled workers for a limited period *i.e.* during the construction/development stage only and once the project is commissioned, only a limited number of technical workforce is required for overseeing the O&M activities of the power plant and as such the respondents have engaged the contractors for the implementation of the project. It is further asserted that the project was executed through the contractors as the respondent company was registered under the provisions of Contract Labour (Regulation & Abolition) Act, 1970. The petitioner was engaged by M/s Vasistha Earth Works who was one of the contractors of the respondents and wages to him have also been paid by the above contractor, hence there was never a relationship of employer and employee between the petitioner and respondents and as such the petitioner has no legal right to claim employment from the respondents. Since, the work which had been awarded to the contractor M/s Vasistha Earth Works was completed, hence, the petitioner was retrenched by the contractor in accordance with law after payment of retrenchment benefits *i.e.* one month's wages in lieu of retrenchment notice, retrenchment compensation and leave salary. It is also asserted that the claim of the petitioner is barred by delay as the petitioner was retrenched in the year 2014 and the matter has been referred by the appropriate government in the year 2017.

5. On merits, it is denied that the petitioner was ever working with the respondents. There is no question of retaining any junior person. The petitioner was never engaged by the replying

respondent rather he was engaged by the contractor M/s Vasistha Earth Works. The petitioner has admitted that he has already been given the retrenchment notice and received retrenchment compensation. The other factum with respect of the engagement of the petitioner can only be replied by the Contractor *i.e* M/s Vasistha Earth Works. It was only after commissioning of the project, the respondent has engaged limited O&M skilled staff. There is no question of engaging any junior person as the petitioner and others have been engaged by M/s Vasistha Earth Works. The question of alleged seniority of the petitioner or other persons is also denied. It is prayed that the claim may be dismissed.

6. In rejoinder, the petitioner While controverting the averments made thereto in the reply and there by reaffirming and reiterating the contents of statement of claim.

7. On elucidating the pleading of parties, the following issues were struck down by my Learned Predecessor for its final determination *vide* Court order dated 20-9-2018.

1. Whether the demand of the petitioner regarding his reengagement in service before the management of respondents after getting his full & final dues is legal and justified? . . .*OPP*.
2. If issue No. 1 is proved in affirmative to what relief of service benefits the petitioner is entitled? . . .*OPP*.
3. Whether the petitioner is not a workman as alleged? . . .*OPR*.
4. Whether there is no relationship of employee and employer between the petitioner and the respondents, as alleged? . . .*OPR*.
5. Whether the dispute raised by the petitioner is barred by time, as alleged? . . .*OPR*.
6. Whether there is no cause of action available to the petitioner due to the non-impleadment of Vasistha Earth Works as alleged? . . .*OPR*.
7. Whether the claim petition is not maintainable as alleged? . . .*OPR*.
8. Relief

8. Henceforth, parties to the dispute were asked to adduce oral as well as documentary evidence in support of their respective claims or issues so framed.

9. I have heard the Learned Counsel for the parties and also gone through the record of the case carefully.

10. For the reasons to be recorded hereinafter, while discussing the aforesaid issues, my findings on the aforesaid issues are as follows:

Issue No. 1:	Yes
Issue No. 2:	Entitled to reinstatement with seniority and continuity but without back- wages.
Issue No. 3:	No
Issue No. 4:	No

Issue No. 5:	No
Issue No. 6:	No
Issue No. 7:	No
Relief:	Reference partly answered in favour of the petitioner as per operative part of the Award.

REASONS FOR FINDINGS

Issues No. 1 & 6 :

11. Both these issues are intermingled and inter connected, as mutually existed and required the common appreciation of evidence, being taken up together for the purpose of their determination and adjudication.

12. Shri Niranjan Verma, Advocate for the petitioner contended with all vehemence that the petitioner was working with the respondent continuously upto 14-10-2014, when the services of the petitioner were terminated after giving notice and retrenchment compensation despite the fact that the respondent had retained the persons junior to him. The services of the petitioner have been terminated without following the procedure. The petitioner was working continuously with the respondent since 14-10-2010. No reasonable opportunity was afforded to the petitioner in accordance with law. Mere giving of notice is not sufficient for the purpose of disengaging the services of the petitioner, more particularly, when the work is available with the respondent. The termination of the petitioner is totally illegal and against the principles of natural justice. The action on the part of the respondent is in violation of sections 25-F, 25-G and 25-H of the Act.

13. *Per contra*, Shri Malkiyat Singh, Advocate for the petitioner strenuously argued that after the award of Hydro Electric Project to the respondent, the memorandum of understanding was executed with State of Himachal Pradesh on 27-10-2006. On detailed investigations and techno-economic studies of the project, detailed report was submitted to the Government of H.P. for execution of Project and thereafter the agreement was executed between the State and the respondent for the implementation of the project. The work was executed through different contractors. M/s Vasistha Earth Works is one of the contractor who has employed the workers for the execution of the civil work. The petitioner/claimant was engaged by M/s Vasistha Earth Works. The muster rolls were prepared and wages were also paid to the petitioner by M/s Vasistha Earth Works. At the time of retrenchment, the claimant was paid full & final retrenchment compensation by the M/s Vasistha Earth Works. He further argued that from the testimony of Shri Nirmal Kumar (RW-1) and Lachmi Dass (RW- 2), it is proved that the present workers are the workers of M/s Vasistha Earth Works, who is an independent contractor registered under the Labour Contract (Regulation & Abolition) Act. It is the liability of the independent contractor to re-employ the petitioner/claimant.

14. Learned counsel appearing on behalf of the respondent further contended that the present claim petition is not maintainable as the respondent was not the employer of the petitioner and he was engaged by the Contractor, does not fall within the ambit of the Act. It is therefore, prayed that the claim petition may kindly be dismissed.

15. I have given my best anxious considerable thought to the respective submissions of the Learned Counsel for the petitioner, as well Learned Counsel for the respondent and have also scrutinized the entire case record with minute care, caution and circumspection.

16. The petitioner namely Satpal Singh examined himself as (PW-1) and thereby reiterated the contents of the statement of claim. He was working as a helper since 14-10-2010 till 10-4-2014. The respondent had only paid PF while terminating his services. The respondent had also issued identity card (PW-1/A). He has completed 240 days in all calendar years while working with the respondent. The respondent has retained persons junior to him. There is still work in the project. The respondents are still engaging fresh hands even today. It is prayed that his termination may be quashed and set aside and he may be reinstated with all consequential benefits.

17. In cross-examination, he feigned ignorance that Vasistha Earth Works had terminated his services after paying him the retrenchment compensation. He denied that he was the worker of Vasistha Earth Works and not that of the respondent. He feigned ignorance that the entire work was got executed by the respondent from the sub-contractor and the respondent had a licence in this behalf. He admitted that the name of the contractor has been reflected as Vasistha Earth Works in (PW-1/A). He denied that he was never the employee of Ganga Dhari Hydro Power project but he was the worker of the Vasistha Earth works.

18. Conversely, Shri Nirmal Kumar Yadav, Dy. G.M. Gangadhari Hydro Power Pvt. Ltd., Jogni, testified as (RW-1). He reiterated the contents of the reply thereto in verbatim. He deposed that the project in question is a small hydro project and is presently supplying electricity to the HPSEB. During the course of executing the project the respondent Gangadhari Hydro Power Ltd., had engaged contractors for civil and electric work. The respondent had got itself registered under the H.P. Contract Labour (Regulation & Abolition) Act. The registration certificate is (RW-1/C) and the details of the contractors to whom the work was allocated is reflected in (RW-1/C). The petitioner had been engaged by Vashishtha Earth Works for the purpose of executing civil work. The wages and the muster rolls in this behalf were also prepared by the said Vasistha Earth Works. Some of the extracts showing that the muster rolls were maintained by Vasistha Earth Works are (RW-1/D) and (RW-1/E). The name of the petitioner and other workmen who have challenged their termination is reflected in the muster roll at serial number 9, 10, 12, 15, 21, 25 and 30. The petitioner had been retrenched by the contractor after the work had come to an end. As per (RW-1/F), the petitioner was paid full & final settlement by Vasistha Earth Works at the time of his retrenchment. The petitioner had received the said compensation without any protest. After the work had finished the respondent had retained the records of the contractors for the purpose of maintaining record. As of today there are only 22 staff members who have been engaged for looking after the operational and maintenance requirements of the project. Out of the aforesaid 22 staff only 10 are unskilled workers. Vasistha Works had also issued I.D Card to the workers and sought permission from the Labour Department in this behalf. The I.D Cards bears the signatures of the contractors only. The petitioner was never the worker of the respondent and he had never been terminated by the respondent. There are no persons junior to the petitioner in the engagement of the respondent Gangadhari.

19. In cross-examination, he expressed his ignorance that (PW-1/A) was an offer of appointment issued by the respondent Gangadhari. He denied that the petitioner and other workers were the employees of the respondent Gangadhari and the Identity Card had also been issued by them. He denied that the petitioner and other workers had not been retrenched by Vasistha Earth Works by the respondent. He feigned ignorance that Prem Singh, Uttam Singh, Deep Kumar, Anil Kumar, Ranvir, Bhagat Singh, Dharam Singh and Yashpal who were junior to the petitioner are still working with the respondent Gangadhari. He denied that the full & final settlement placed on record is a fraud and signatures of the petitioner are also forged. He denied that the muster rolls (RW-1/D) and (RW-1/E) are also forged and fabricated. He further denied that the petitioner was the employee of the Gangadhari and had been illegally terminated.

20. The respondent has also examined (RW-2) Shri Lachi Dass, who stated that the respondent had engaged contractors for construction, civil and electric works. There were four

contractor namely Bajrang Construction, Vashistha Works, A.K Raghu and one Kali Bahadur. The petitioner had been engaged by the Vashistha Works and as a principal employer they were only supervising the work of the labour. They only used to supervise that the wages were being paid to the workers and they were the same whose names were reflected in the muster rolls. The contractor had paid them the retrenchment compensation in his presence.

21. In cross-examination he denied that (PW-1/A) bears the signatures of the management. Volunteered that the signatures are of the contractors. He admitted that the 22 workers presently working were engaged after the engagement of the petitioner. He denied that the petitioner was the employee of Vashistha Earth Works and not of Gangadhari.

22. (RW-1/A) is the copy of resolution dated 7-1-2017, authorizing Shri Nirmal Kumar Yadav to institute, defend and represent the respondent in the Court proceedings.

23. (RW-1/B) is the copy of letter dated 1-4-2014, on the subject 2x8.0 MW Jogini-SHEP-Synchronization Commissioning and achieving Commercial operation of Power House whereby final approval has been accorded to commission Jogini Power House Project to operative *w.e.f.* 27-3-2014, addressed to Chief Engineer (SO&P) HPSEB, copy of which was forwarded to the respondent M/s Gangdari Hydro Power Pvt. Ltd.

24. (RW-1/C) is the copy of details of contractors/company and work awarded/allotted in respect of Jogini SHEP whereby the work of Civil and construction at Jogini site Rampur was allotted to Vasistha Earth Works, the work of tunnel at Jogini site, Rampur was allotted to Bajrang constructions, the work of fabrication at Bhadarsh Rampur was allotted to AK Raghu and civil work at Jogini site Rampur was allotted to Kali Bahadur.

25. (RW-1/D) and (RW-1/E) are the copies of muster rolls issued by Vasista Earth Works.

26. (RW-1/F) is the copy of full & final statement of the petitioner and retrenchment compensation given to the petitioner.

27. On the contrary, (PW-1/A) is the identity card issued in the name of the petitioner by Gangadhari Hydro Power (P) Ltd. and duly attested by Labour Officer Rampur Zone.

28. Before advertng to the rival legal contentions advanced on behalf of the parties, it is important to consider the relevant provisions of the Act in play in the instant case.

The Industrial Disputes Act, 1947, is:

“An act to make provision for the investigation and settlement of industrial disputes, and for certain other purposes”

Section 2(s) defines a Workman as :

“2(s). “workman” means any person (including an apprentice) employed in any industry to do any manual, unskilled, skilled, technical, operational, clerical or supervisory work for hire or reward, whether the terms of employment be express or implied, and for the purposes of any proceeding under this Act in relation to an industrial dispute, includes any such person who has been dismissed, discharge or retrenched in connection with, or as a consequence of, that dispute, or whose dismissal, discharge or retrenchment has led to that dispute, but does not include any such person—

- (i) who is subject to the Air Force Act, 1950 (45 of 1950), or the Army Act, 1950 (46 of 1950), or the Navy Act, 1957 (62 of 1957); or

- (ii) who is employed in the police service or as an officer or other employee of a prison; or
- (iii) who is employed mainly in a managerial or administrative capacity; or
- (iv) who, being employed in a supervisory capacity, draws wages exceeding (ten thousand rupees) per mensem or exercises, either by the nature of the duties attached to the office or by reason of the powers vested in him, functions mainly of a managerial nature.”

Section 2(oo) lays down the concept of retrenchment as:

“Retrenchment means the termination by the employer of the service of a workman for any reason whatsoever, otherwise than as a punishment inflicted by way of disciplinary action, but does not include—

- (a) voluntary retirement of the workman;
- (b) retirement of the workman on reaching the age of superannuation if the contract of employment between the employer and the workman concerned contains a stipulation in that behalf;
- (bb) termination of the service of the workman as a result of the non-renewal of the contract of employment between the employer and the workman concerned on its expiry or of such contract being terminated under a stipulation in that behalf contained therein;
- (c) termination of the service of a workman on the ground of continued ill-health.”

29. On the other hand, the learned counsel appearing on behalf of the petitioner contended that the petitioner is squarely covered under the definition of “workman” under the Act.

30. I am unable to agree with the contention advanced by the learned counsel appearing on behalf of the respondent. The question “who is a workman” has been well settled by various judgments of the Hon’ble Supreme Court. In the case of *H.R. Adyanthaya vs. Sandoz (India) Ltd. (1997) 5 SCC 737*, a Constitution Bench of the Hon’ble Supreme Court has held as under:

“..We thus have three Judge Bench decisions which have taken the view that a person to be qualified to be a workman must be doing the work which falls in any of the four categories, viz, manual, clerical, supervisory or technical and two two-judge Bench decisions which have by referring to one or the other of the said three decisions have reiterated the said law. As against this, we have three three-judge Bench decisions which have without referring to the decisions in May & Baker, WIMCO and Bunnah Shell cases (supra) have taken the other view which was expressly negated, viz., if a person does not fall within the four exceptions to the said definition he is a workman within the meaning of the ID Act. These decisions are also based on the facts found in those cases. They have, therefore, to be confined to those facts. Hence the position in law as it obtains today is that a person to be a workman under the ID Act must be employed to do the work of any of the categories, viz., manual, unskilled, skilled, technical, operational, clerical or supervisory. It is not enough that he is not covered by either of the four exceptions to the definition. We reiterate the said interpretation.”

31. It is contended on behalf of the respondent that the services of the petitioner had been engaged by the contractor on contractual basis which is purely temporary and co-terminus with the

project. The services of the petitioner stood automatically terminated by issuance of retrenchment notice and by making full & final retrenchment compensation.

32. Admittedly, there is absolutely no denial to the fact that the petitioner worked as helper with the respondent *w.e.f.* 14-10-2010 till 10-4-2014. It is not in dispute that the respondent had time and again raised the issue that the petitioner had worked as a contractual labor with the Vasisth Earth Works as is evident from the muster roll (RW-1/D) and (RW-1/E), which is month wise attendance of the petitioner. The muster-roll is the month wise attendance detail of the petitioner who has worked as helper being a contractual employee purely temporary in nature. Thus, there are evidence available on record particularly the documents (RW-1/B), the copy of letter dated 1-4-2014, it could be legitimately held that it is the respondent Gangadhari who were allotted to into 8.0 MW, Jogini State Small Hydro Power Project- Synchronization Commissioning and achieving commercial operation of Power house *w.e.f.* 27-3-2014. In the said letter there is no reference to M/s Vasistha Earth Works. The only case pleaded from the side of the respondent is that since the civil, construction and fabrication works were allotted by the respondent to various contractors namely Vasistha Earth Works, Bajrang constructions, AK Raghu and Kali Bahadur and the petitioner and other workers had been engaged by contractors. It is proved on record that the petitioner had been engaged by the respondent on fixed salary of Rs. 3384/ per month. It appears that he had accepted such offer as per the full & final statement (RW-1/F). It is also admitted fact that the petitioner had worked continuously from 14-10-2010 till 10-4-2014 when the petitioner was paid full & final retrenchment compensation after giving the retrenchment notice. It is argued that such notice or compensation on account of his retrenchment was given by Vasistha Earth Works, therefore, it is Vasistha Earth Works who is responsible and not the respondent. It was vociferously argued by the petitioner that Shri Nirmal Kumar Yadav (RW-1) during his cross-examination has categorically admitted that the petitioner and other workers were issued identity cards by the respondent. He also halfheartedly feigned ignorance that the offer of appointment was issued by the respondent. He again feigned ignorance that the persons junior to the petitioner namely Prem Singh, Uttam Singh, Deep Kumar, Anil Kumar, Ranvir, Bhagat Singh, Dharam Singh and Yashpal are still working with the respondent. Thus, this admission automatically proved the case of the petitioner. The recital of the letter (RW-1/B) clearly shows that the respondent had been allotted the synchronization commissioning and achieving commercial operation of Power House. So far as concerning the engaging of various contractors to execute the work on contractual basis, it is admitted that the identity cards were issued by the respondent. The identity card (PW-1/A) clearly shows that the petitioner was the worker/employee of Gangadhari Hydro Power Project, which has been duly attested by the Labour Officer. It is the basic law that documentary evidence as compelled oral evidence, has given to weight. Thereafter, as per full & final statement (RW-1/F), the petitioner had been paid the full & final payment towards retrenchment compensation on issuance of retrenchment notice by Vasistha Earth Works whereby the petitioner was shown to be helper and joined the company since 19-10-2010. The petitioner was engaged on fixed salary of Rs. 3708/- per month and worked continuously *w.e.f.* 19-10-2010 till 31-3-2014. As discussed above, as per identity card (PW-1/A) the petitioner is shown to have been employed as helper by the respondent *w.e.f.* 1-5-2011 wherein the necessary particulars of the petitioner were duly recorded. It is manifested that only after accepting the terms and conditions of the appointment, the petitioner had been working with the respondent as helper and had continuously worked till 31-3-2014. Therefore, the entire documentary proof placed on record duly unfold that the services of the petitioner had been engaged by the respondent company.

33. The petitioner as per his pleadings and evidence on record clarified that he was relieved from his duties by issuance of retrenchment notice on making retrenchment compensation as on 31-3-2014.

34. So far as concerning the retrenchment of a workman there are certain conditions, procedure which requires to be qualified as provided under section 25-F, 25-G and 25-H of the Act, which reads as under:

25F. Conditions precedent to retrenchment of workmen.—

No workman employed in any industry who has been in continuous service for not less than one year under an employer shall be retrenched by that employer until—

- (a) the workman has been given one month's notice in writing indicating the reasons for retrenchment and the period of notice has expired, or the workman has been paid in lieu of such notice, wages for the period of the notice:
- (b) the workman has been paid, at the time of retrenchment, compensation which shall be equivalent to fifteen days' average pay² for every completed year of continuous service or any part thereof in excess of six months; and
- (c) notice in the prescribed manner is served on the appropriate Government³ or such authority as may be specified by the appropriate Government by notification in the Official Gazette”.

25G. Procedure for retrenchment.—

Where any workman in an industrial establishment, who is a citizen of India, is to be retrenched and he belongs to a particular category of workmen in that establishment, in the absence of any agreement between the employer and the workman in this behalf, the employer shall ordinarily retrench the workman who was the last person to be employed in that category, unless for reasons to be recorded the employer retrenches any other workman.

25H. Re-employment of retrenched workmen.—

Where any workmen are retrenched, and the employer proposes to take into his employ any persons, he shall, in such manner as may be prescribed, give an opportunity to the retrenched workmen who are citizens of India to offer themselves for re-employment and such retrenched workman who offer themselves for re-employment shall have preference over other persons.

35. Section 25-B of the Act defines continuous service.—In terms of sub section 2 of Section 25-B, if a workman during a period of twelve calendar months preceding the date with reference to which calculations to be made has actually worked under the employer for a period of one year, he will deemed to be in continuous service. Admittedly, the petitioner had been working since May, 2010 till 31-3-2014, which burden of proof has been satisfactorily discharged by the petitioner that he had worked for 240 days in a calendar year which is the bench mark as settled by the **Hon' ble Apex Court in case titled R.M 2006 (1) SCC 106**. Similarly, it has been laid down by the **Hon' ble Apex Court in 2019 (1) SCC 138** that when the workman had worked for required 240 days of the working in the period of twelve calendar months preceding the date of dismissal, he is entitled to take the benefit of the provisions of section 25-F of the Act.

36. It is claimed by the petitioner that at the time of termination of his services, the persons junior to him were retained by the respondent. Shri Nirmal Kumar Yadav (RW-1) had feigned ignorance that persons junior to the petitioner namely Prem Singh, Uttam Singh, Deep Kumar, Anil Kumar, Ranvir, Bhagat Singh, Dharam Singh and Yashpal are still working with the respondent. A detail of such persons is also given in the statement of claim and rejoinder that junior persons namely Prem Singh, Uttam Singh, Deep Kumar, Anil Kumar, Ranvir, Bhagat Singh, Dharam Singh and Yashpal are still working with the respondent. Though, the respondent has

refuted such allegations and claimed that no persons junior to the petitioner had ever been retained. There is no iota of evidence led by the respondent before this Tribunal to prove that no person junior to the petitioner had been retained/engaged in service by the respondent. Though, no seniority list has been proved/placed on record by the petitioner but his oral evidence to the effect that persons junior to him were retained by the respondent and after his retrenchment, they are still working with the respondent. This contention of the petitioner has gone un rebutted and unchallenged, hence, the version of the petitioner that after his termination, persons junior to him were retained by the respondent has to be accepted.

37. Since, the provisions of sections 25-G and 25-H have been contravened, it was not obligatory for the petitioner to have completed 240 days in a block/calendar year. Here, I am fortified by the judgment rendered by our own Hon'ble High Court in case **State of H.P. Vs. Pratap Singh. 2017 (1) HLR 286**. Thus, it can be safely concluded that the respondent has contravened the provisions of Section 25-G of the Act as such the termination of the services of the petitioner is held to be illegal and unjustified.

38. However, the allegations set forth from the side of the petitioner that the respondent had violated the provisions of Section 25-H, to my mind does not bears to have been substantive. In the petitioner's evidence as (PW-1), he has failed to name those persons who have engaged after his retrenchment. The all material placed on record, thus, being too nebulous to lend any credence to the allegations put forth by the petitioner that new workmen were employed without affording opportunity to the petitioner being retrenched employee for such employment after the termination of the services of the petitioner. Therefore, the respondent cannot be said to have violated the provisions of Section 25-H of the Act.

39. Thus, in view of my above discussion, I have no hesitation in holding that the services of the petitioner *w.e.f.* 31-3-2014 have been illegally terminated by the respondent without following the provisions of the Act. Accordingly all these issues are decided in favour of the petitioner and against the respondent.

Issue No. 2 :

40. Since, I have held under issue No.1 above that the services of the petitioner have been illegally terminated by the respondent without complying with the provisions of Section 25-F and 25-G of the Act, it is ordered that he be reinstated in service with seniority and continuity. Now, the question which arises for consideration, before this Court is as to whether the petitioner is entitled to full back wages as contended by the learned counsel for the petitioner. In **(2009) 1 SCC 20, Kanpur Electricity Supply Company Limited Vs. Shamim Mirza**, the Hon'ble Apex Court has held that once the order of termination of services of an employee is set-aside, ordinarily, the relief of reinstatement is available to him. However, the entitlement of an employee to get reinstated does not necessarily result in payment of full or partial back-wages, which is independent of reinstatement. It has further been held by the **Hon' ble Apex Court in 2010 (1) SLJ S.C 70, M/s Ritu Marbals Vs. Prabhakant Shukla that** full back wages cannot be granted mechanically, upon an order of termination be declared illegal. It is further held that reinstatement must not be accompanied by payment of full back wages even for the period when the workman remained out of service and contributed little or nothing to the Industry.

41. Moreover, the petitioner was under an obligation to prove by leading cogent evidence that she was not gainfully employed after the termination of her services. The initial burden is on the workman/employee to show that she was not gainfully employed as held by the **Hon' ble Apex Court in (2005) 2 Supreme Court Cases 363 titled as Kendriya Vidyalaya Sangathan and another Vs. S.C Sharma** that:

16. “When, the question of determining the entitlement of a person to back-wages is concerned, the employee has to show that he was not gainfully employed. The initial burden is on him. After and if he places materials in that regard, the employer can bring on record materials to rebut the claim”

42. For the foregoing reasons, the petitioner has failed to discharge his burden by placing any material on record that he was not gainfully employed after his termination/disengagement.

43. In view of the entire evidence, on record, coupled with the rulings (*supra*), I have no hesitation in holding that the petitioner is entitled for **reinstatement in service with continuity and seniority. However, the petitioner is not entitled to any back-wages.** Hence, this issue is decided in favour of the petitioner and against the respondent.

Issue No.3 & 4 :

44. Being interlinked and correlated both these issues are taken up together for discussion and decision.

45. A conjoint reading of Clause G and Clause S of Section 2 of the Act would clearly embarked that the workman is a person who has been employed for any manual, unskilled, skilled, technical, operational, clerical or supervisory work for hire or reward, where the terms of employment be expressed or implied and for the purpose of any proceeding under this Act in relation to an industrial dispute, includes any such person who has been dismissed, discharged or retrenched in connection with, or as a consequence of, that dispute, or whose dismissal, discharge or retrenchment has led to that dispute. Similarly, where there is in in relation to an industry carried on by or under the authority of any department Government or a State Government, the authority prescribed in this behalf, or where no authority is prescribed, to be an employer. Clause (j), of the Act provides that any business, trade, undertaking, manufacture or calling of employers and includes any calling service employment, handicraft or industrial occupation or avocation of workmen shall be termed as “industry”. Therefore, as per the words embodied in Clauses g, j and s of the Act, would clearly emancipate that there is a clear cut relationship of employer and employee between the petitioner and the respondent company. The identity cards were issued in the name of the Gangadhari and mere mentioning the name of its contractor M/s Vasistha Earth Works would tantamount as a comafauge and nothing else. Accordingly, both these issues are decided in favour of the petitioner and against the respondent.

Issue No. 5 :

46. In support of this issue, no evidence was led by the respondent being the legal issue. However, I have scrutinized the record of the case and observed that there is no limitation under the Industrial Disputes Act, 1947 as it was held by their lordship of **Hon’ble Supreme Court in a case reported in (1999) 6 SCC 82 incase titled as Ajayab Singh Vs. Sirhind Co-operative Marketing –cum-processing Service Society Limited and Another.** in which it was held that:—

“the provisions of Article 137 of Limitation Act, 1963 are not applicable to the proceedings under the ID Act. The relief under the ID Act cannot be denied merely on the ground of delay. The plea of delay if raised by the employer is required to be proved as a matter of fact by showing the real prejudice and not as a merely hypothetical defence. No reference to the Labour Court can be generally questioned on the ground of delay alone”

47. Thus, on the strength of above ruling, it can safely be concluded that this petition is not barred by limitation. Accordingly, this issue is decided in favour of the petitioner and against the respondent.

Issue No. 7 :

48. In support of this issue, no evidence has been led by the respondent. However, the petitioner has filed this claim petition pursuant to the reference made by the appropriate government to this Court for adjudication. I find nothing wrong with this petition which is legally maintainable. Accordingly, this issue is decided in favour of the petitioner and against the respondent.

Relief :

49. As a sequel to my above discussion and findings on issues No. 1 to 7, the claim of the petitioner succeeds and is hereby partly allowed resultantly the petitioner is ordered to be **reinstatement in service forthwith with seniority and continuity**. However the petitioner is not entitled to back wages. The reference is ordered to be partly answered in favour of the petitioner and against the respondent. Let a copy of this award be communicated to the appropriate government for publication in official gazette. File, after completion, be consigned to records. Ordered accordingly.

Announced in the open Court today this 1st day of November, 2021.

Sd/-
(RAJESH TOMAR),
Presiding Judge,
Industrial Tribunal-cum-Labour Court, Shimla.

**BEFORE SHRI RAJESH TOMAR, PRESIDING JUDGE, H.P. INDUSTRIAL TRIBUNAL-
CUM-LABOUR COURT, SHIMLA**

Reference Number : 43 of 2017

Instituted on : 7-3-2017

Decided on: 1-11-2021

Surjan Dass s/o Shyam Lal, r/o Village Munish, P.O. Munish Bahali, Tehsil Rampur, District Shimla, H.P. . *Petitioner.*

Versus

1. M/s Ganga Dari Hydro Project (P) Ltd., Gamba House South End Lane IV, New Shimla-9, H.P.

2. M/s Ganga Dari Hydro Project (P) Ltd. Jogni, P.O. Munish Bahali, Tehsil Rampur, District Shimla, H.P. . *Respondents.*

Reference under section 10 of the Industrial Disputes Act, 1947

For the Petitioner: Shri Niranjana Verma, Advocate

For the Respondent: Shri Malkiyat Singh, Advocate

AWARD

The following reference has been sent by the Appropriate Government for final adjudication:

“Whether demand of Shri Surjan Dass s/o Shri Shyam Lal, Village Munish, P.O. Munish Bahali, Tehsil Rampur, District Shimla regarding his re-engagement in service before the management of M/s Ganga Dari Hydro Power Pvt. Ltd., Gamba House South End Lane IV Phase-1, New Shimla-171009 (site office M/s Ganga Dari Hydro Power Pvt. Ltd., Jogni, P.O. Munish Bahali, Tehsil Rampur, District Shimla, HP) after getting his full & final dues, is legal and justified? If yes, what relief the above workman is entitled to from the above management?”

2. On receipt of reference from the Appropriate Government, notices were issued to the concerned parties in pursuance to which the petitioner has filed his statement of claim.

3. Material facts necessary for the disposal of the reference are thus that initially the petitioner was engaged by the respondent as helper on 14-10-2010 and worked continuously till 10-4-2014 when his services had been terminated after giving notice and retrenchment compensation despite the fact that his juniors namely Prem Singh, Uttam Singh, Deep Kumar, Anil Kumar, Ranveer, Bhagat Singh, Dharam Singh and Yashpal have been retained in service and even new persons have been engaged by the respondents. The services of the petitioner have been terminated without following the procedure in accordance with law, hence, the action of the respondents in violation of sections 25-F and 25-N of the Industrial Disputes Act, 1947 (hereinafter to be referred as the Act). It is averred that before terminating the services of the petitioner no reasonable opportunity was afforded to him and mere giving the notice is not sufficient for disengaging his services. Lastly, it is averred that the termination of the petitioner is illegal and against the principles of the natural justice and contrary to Article 14, 16 and 21 of the Constitution of India. The following relief clause has been appended in the footnote of statement of claim as under:

It is, therefore, respectfully prayed that keeping in view the facts and circumstances narrated in the statement of claim, the termination orders dated 31-3-2014, may kindly be quashed and the services of the petitioner may kindly be reinstated retrospectively with all consequential benefits including continuity in service, seniority, full back-wages etc. in the interest of justice and fair play.

4. The lis was resisted and contested by filing written reply on *inter-alia* preliminary objections that there is no industrial dispute as defined in section 2(k) of the Act, petitioner is not a workman as defined under section 2(s) of the Act, there is no employee and employer relationship between the petitioner and the respondents, this Tribunal is having no jurisdiction, the dispute raised by the petitioner is hopelessly barred by time and the dispute raised by the petitioner is an issue covered under Contract Labour (regulation and Abolition) Act, 1970. It is asserted that in the year 2006, 16 MW Jogini Hydroelectric Project was awarded to the respondent company by the Government of Himachal Pradesh in accordance with the policies of the State and Central Government for development and promotion of generation of electricity from small hydro power plants in the state of Himachal Pradesh and in the Country, hence, a memorandum of understanding was executed with the State of Himachal Pradesh on 27-10-2006 and after that the respondents submitted the DPR for execution of project to the Government upon which an agreement was reached between the State of H.P. and the respondents for implementation of the Project. The Project being small scale hydroelectric project would require unskilled workers for a limited period *i.e* during the construction/development stage only and once the project is commissioned, only a

limited number of technical workforce is required for overseeing the O&M activities of the power plant and as such the respondents have engaged the contractors for the implementation of the project. It is further asserted that the project was executed through the contractors as the respondent company was registered under the provisions of Contract Labour (Regulation & Abolition) Act, 1970. The petitioner was engaged by M/s Vasistha Earth Works who was one of the contractors of the respondents and wages to him have also been paid by the above contractor, hence there was never a relationship of employer and employee between the petitioner and respondents and as such the petitioner has no legal right to claim employment from the respondents. Since, the work which had been awarded to the contractor M/s Vasistha Earth Works was completed, hence, the petitioner was retrenched by the contractor in accordance with law after payment of retrenchment benefits *i.e.* one month's wages in lieu of retrenchment notice, retrenchment compensation and leave salary. It is also asserted that the claim of the petitioner is barred by delay as the petitioner was retrenched in the year 2014 and the matter has been referred by the appropriate government in the year 2017.

5. On merits, it is denied that the petitioner was ever working with the respondents. There is no question of retaining any junior person. The petitioner was never engaged by the replying respondent rather he was engaged by the contractor M/s Vasistha Earth Works. The petitioner has admitted that he has already been given the retrenchment notice and received retrenchment compensation. The other factum with respect of the engagement of the petitioner can only be replied by the Contractor *i.e.* M/s Vasistha Earth Works. It was only after commissioning of the project, the respondent has engaged limited O&M skilled staff. There is no question of engaging any junior person as the petitioner and others have been engaged by M/s Vasistha Earth Works. The question of alleged seniority of the petitioner or other persons is also denied. It is prayed that the claim may be dismissed.

6. In rejoinder, the petitioner while controverting the averments made thereto in the reply and thereby reaffirming and reiterating the contents of statement of claim.

7. On elucidating the pleading of parties, the following issues were struck down by my Learned Predecessor for its final determination *vide* Court order dated 20-9-2018:

1. Whether the demand of the petitioner regarding his reengagement in service before the management of respondents after getting his full & final dues is legal and justified? . . .*OPP.*
2. If issue No. 1 is proved in affirmative to what relief of service benefits the petitioner is entitled? . . .*OPP.*
3. Whether the petitioner is not a workman as alleged? . . .*OPR.*
4. Whether there is no relationship of employee and employer between the petitioner and the respondents, as alleged? . . .*OPR.*
5. Whether the dispute raised by the petitioner is barred by time, as alleged? . . .*OPR.*
6. Whether there is no cause of action available to the petitioner due to the non-impleadment of Vasistha Earth Works as alleged? . . .*OPR.*
7. Whether the claim petition is not maintainable as alleged? . . .*OPR.*
8. Relief

8. Henceforth, parties to the dispute were asked to adduce oral as well as documentary evidence in support of their respective claims or issues so framed.

9. I have heard the Learned Counsel for the parties and also gone through the record of the case carefully.

10. For the reasons to be recorded hereinafter, while discussing the aforesaid issues, my findings on the aforesaid issues are as follows:

<i>Issue No. 1 :</i>	<i>Yes</i>
Issue No. 2 :	Entitled to reinstatement with seniority and continuity but without back-wages.
Issue No. 3 :	No.
Issue No. 4 :	No.
Issue No. 5 :	No.
Issue No. 6 :	No.
Issue No. 7 :	No.
Relief :	Reference partly answered in favour of the petitioner as per operative part of the Award.

REASONS FOR FINDINGS

Issues No.1 & 6 :

11. Both these issues are intermingled and inter connected, as mutually existed and required the common appreciation of evidence, being taken up together for the purpose of their determination and adjudication.

12. Shri Niranjana Verma, Advocate for the petitioner contended with all vehemence that the petitioner was working with the respondent continuously upto 14-10-2014, when the services of the petitioner were terminated after giving notice and retrenchment compensation despite the fact that the respondent had retained the persons junior to him. The services of the petitioner have been terminated without following the procedure. The petitioner was working continuously with the respondent since 14-10-2010. No reasonable opportunity was afforded to the petitioner in accordance with law. Mere giving of notice is not sufficient for the purpose of disengaging the services of the petitioner, more particularly, when the work is available with the respondent. The termination of the petitioner is totally illegal and against the principles of natural justice. The action on the part of the respondent is in violation of sections 25-F, 25-G and 25-H of the Act.

13. *Per contra*, Shri Malkiyat Singh, Advocate for the petitioner strenuously argued that after the award of Hydro Electric Project to the respondent, the memorandum of understanding was executed with State of Himachal Pradesh on 27-10-2006. On detailed investigations and techno-economic studies of the project, detailed report was submitted to the Government of H.P. for execution of Project and thereafter the agreement was executed between the State and the respondent for the implementation of the project. The work was executed through different contractors. M/s Vasistha Earth Works is one of the contractor who has employed the workers for the execution of the civil work. The petitioner/claimant was engaged by M/s Vasistha Earth Works. The muster rolls were prepared and wages were also paid to the petitioner by M/s Vasistha Earth

Works. At the time of retrenchment, the claimant was paid full & final retrenchment compensation by the M/s Vasistha Earth Works. He further argued that from the testimony of Shri Nirmal Kumar (RW-1) and Lachmi Dass (RW-2), it is proved that the present workers are the workers of M/s Vasistha Earth Works, who is an independent contractor registered under the Labour Contract (Regulation & Abolition) Act. It is the liability of the independent contractor to re-employ the petitioner/claimant.

14. Learned counsel appearing on behalf of the respondent further contended that the present claim petition is not maintainable as the respondent was not the employer of the petitioner and he was engaged by the Contractor, does not fall within the ambit of the Act. It is therefore, prayed that the claim petition may kindly be dismissed.

15. I have given my best anxious considerable thought to the respective submissions of the Learned Counsel for the petitioner, as well Learned Counsel for the respondent and have also scrutinized the entire case record with minute care, caution and circumspection.

16. The petitioner namely Surjan Dass examined himself as PW-1 and thereby reiterated the contents of the statement of claim. He was working as a helper since 14-10-2010 till 10-4-2014. The respondent had only paid PF while terminating his services. The respondent had also issued identity card (PW-1/A). He has completed 240 days in all calendar years while working with the respondent. The respondent has retained persons junior to him. There is still work in the project. The respondents are still engaging fresh hands even today. It is prayed that his termination may be quashed and set aside and he may be reinstated with all consequential benefits.

17. In cross-examination, he feigned ignorance that Vasistha Earth Works had terminated his services after paying him the retrenchment compensation. He denied that he was the worker of Vasistha Earth Works and not that of the respondent. He feigned ignorance that the entire work was got executed by the respondent from the sub-contractor and the respondent had a licence in this behalf. He admitted that the name of the contractor has been reflected as Vasistha Earth Works in (PW-1/A). He denied that he was never the employee of Ganga Dhari Hydro Power project but he was the worker of the Vasistha Earth works.

18. Conversely, Shri Nirmal Kumar Yadav, Dy. G.M Gangadhari Hydro Power Pvt. Ltd., Jogni, testified as (RW-1). He reiterated the contents of the reply thereto in verbatim. He deposed that the project in question is a small hydro project and is presently supplying electricity to the HPSEB. During the course of executing the project the respondent Gangadhari Hydro Power Ltd., had engaged contractors for civil and electric work. The respondent had got itself registered under the H.P. Contract Labour (Regulation & Abolition) Act. The registration certificate is (RW-1/C) and the details of the contractors to whom the work was allocated is reflected in (RW-1/C). The petitioner had been engaged by Vashishtha Earth Works for the purpose of executing civil work. The wages and the muster rolls in this behalf were also prepared by the said Vasistha Earth Works. Some of the extracts showing that the muster rolls were maintained by Vasistha Earth Works are (RW-1/D) and (RW-1/E). The name of the petitioner and other workmen who have challenged their termination is reflected in the muster roll at serial number 9, 10, 12, 15, 21, 25 and 30. The petitioner had been retrenched by the contractor after the work had come to an end. As per (RW-1/F), the petitioner was paid full & final settlement by Vasistha Earth Works at the time of his retrenchment. The petitioner had received the said compensation without any protest. After the work had finished the respondent had retained the records of the contractors for the purpose of maintaining record. As of today there are only 22 staff members who have been engaged for looking after the operational and maintenance requirements of the project. Out of the aforesaid 22 staff only 10 are unskilled workers. Vasistha Works had also issued I.D Card to the workers and sought permission from the Labour Department in this behalf. The I.D Cards bears the signatures of

the contractors only. The petitioner was never the worker of the respondent and he had never been terminated by the respondent. There are no persons junior to the petitioner in the engagement of the respondent Gangadhari.

19. In cross-examination, he expressed his ignorance that (PW-1/A) was an offer of appointment issued by the respondent Gangadhari. He denied that the petitioner and other workers were the employees of the respondent Gangadhari and the Identity Card had also been issued by them. He denied that the petitioner and other workers had not been retrenched by Vasistha Earth Works by the respondent. He feigned ignorance that Prem Singh, Uttam Singh, Deep Kumar, Anil Kumar, Ranvir, Bhagat Singh, Dharam Singh and Yashpal who were junior to the petitioner are still working with the respondent Gangadhari. He denied that the full & final settlement placed on record is a fraud and signatures of the petitioner are also forged. He denied that the muster rolls (RW-1/D) and (RW-1/E) are also forged and fabricated. He further denied that the petitioner was the employee of the Gangadhari and had been illegally terminated.

20. The respondent has also examined (RW-2) Shri Lachi Dass, who stated that the respondent had engaged contractors for construction, civil and electric works. There were four contractor namely Bajrang Construction, Vashistha Works, A.K Raghu and one Kali Bahadur. The petitioner had been engaged by the Vashistha Works and as a principal employer they were only supervising the work of the labour. They only used to supervise that the wages were being paid to the workers and they were the same whose names were reflected in the muster rolls. The contractor had paid them the retrenchment compensation in his presence.

21. In cross-examination he denied that (PW-1/A) bears the signatures of the management. Volunteered that the signatures are of the contractors. He admitted that the 22 workers presently working were engaged after the engagement of the petitioner. He denied that the petitioner was the employee of Vashistha Earth Works and not of Gangadhari.

22. (RW-1/A) is the copy of resolution dated 7-1-2017, authorizing Shri Nirmal Kumar Yadav to institute, defend and represent the respondent in the Court proceedings.

23. (RW-1/B) is the copy of letter dated 1-4-2014, on the subject 2x8.0 MW Jogini-SHEP-Synchronization Commissioning and achieving Commercial operation of Power House whereby final approval has been accorded to commission Jogini Power House Project to operative *w.e.f.* 27-3-2014, addressed to Chief Engineer (SO&P) HPSEB, copy of which was forwarded to the respondent M/s Gangadhari Hydro Power Pvt. Ltd.

24. (RW-1/C) is the copy of details of contractors/company and work awarded/allotted in respect of Jogini SHEP whereby the work of Civil and construction at Jogini site Rampur was allotted to Vasistha Earth Works, the work of tunnel at Jogini site, Rampur was allotted to Bajrang constructions, the work of fabrication at Bhadarsh Rampur was allotted to AK Raghu and civil work at Jogini site Rampur was allotted to Kali Bahadur

25. (RW-1/D) and (RW-1/E) are the copies of muster rolls issued by Vasista Earth Works.

26. (RW-1/F) is the copy of full & final statement of the petitioner and retrenchment compensation given to the petitioner.

27. On the contrary, (PW-1/A) is the identity card issued in the name of the petitioner by Gangadhari Hydro Power (P) Ltd. and duly attested by Labour Officer Rampur Zone.

28. Before advertng to the rival legal contentions advanced on behalf of the parties, it is important to consider the relevant provisions of the Act in play in the instant case.

The Industrial Disputes Act, 1947, is :

“An act to make provision for the investigation and settlement of industrial disputes, and for certain other purposes.”

Section 2(s) defines a Workman as :

“2(s). “workman” means any person (including an apprentice) employed in any industry to do any manual, unskilled, skilled, technical, operational, clerical or supervisory work for hire or reward, whether the terms of employment be express or implied, and for the purposes of any proceeding under this Act in relation to an industrial dispute, includes any such person who has been dismissed, discharge or retrenched in connection with, or as a consequence of, that dispute, or whose dismissal, discharge or retrenchment has led to that dispute, but does not include any such person—

- (i) who is subject to the Air Force Act, 1950 (45 of 1950), or the Army Act, 1950 (46 of 1950), or the Navy Act, 1957 (62 of 1957); or
- (ii) who is employed in the police service or as an officer or other employee of a prison; or
- (iii) who is employed mainly in a managerial or administrative capacity; or
- (iv) who, being employed in a supervisory capacity, draws wages exceeding [ten thousand rupees] per mensem or exercises, either by the nature of the duties attached to the office or by reason of the powers vested in him, functions mainly of a managerial nature]”

Section 2(oo) lays down the concept of retrenchment as :

“Retrenchment means the termination by the employer of the service of a workman for any reason whatsoever, otherwise than as a punishment inflicted by way of disciplinary action, but does not include—

- (a) voluntary retirement of the workman;
- (b) retirement of the workman on reaching the age of superannuation if the contract of employment between the employer and the workman concerned contains a stipulation in that behalf;
- (bb) termination of the service of the workman as a result of the non-renewal of the contract of employment between the employer and the workman concerned on its expiry or of such contract being terminated under a stipulation in that behalf contained therein;”
- (c) termination of the service of a workman on the ground of continued ill-health”

29. On the other hand, the learned counsel appearing on behalf of the petitioner contended that the petitioner is squarely covered under the definition of “*workman*” under the Act.

30. I am unable to agree with the contention advanced by the learned counsel appearing on behalf of the respondent. The question “who is a workman” has been well settled by various judgments of the Hon’ble Supreme Court. In the case of *H.R. Advanthaya vs. Sandoz (India) Ltd.* (1997) 5 SCC 737, a Constitution Bench of the Hon’ble Supreme Court has held as under:

“..We thus have three Judge Bench decisions which have taken the view that a person to be qualified to be a workman must be doing the work which falls in any of the four categories, viz, manual, clerical, supervisory or technical and two two-judge Bench decisions which have by referring to one or the other of the said three decisions have reiterated the said law. As against this, we have three three-judge Bench decisions which have without referring to the decisions in May & Baker, WIMCO and Bunnah Shell cases (supra) have taken the other view which was expressly negatived, viz., if a person does not fall within the four exceptions to the said definition he is a workman within the meaning of the ID Act. These decisions are also based on the facts found in those cases. They have, therefore, to be confined to those facts. Hence the position in law as it obtains today is that a person to be a workman under the ID Act must be employed to do the work of any of the categories, viz., manual, unskilled, skilled, technical, operational, clerical or supervisory. It is not enough that he is not covered by either of the four exceptions to the definition. We reiterate the said interpretation.”

31. It is contended on behalf of the respondent that the services of the petitioner had been engaged by the contractor on contractual basis which is purely temporary and co-terminus with the project. The services of the petitioner stood automatically terminated by issuance of retrenchment notice and by making full & final retrenchment compensation.

32. Admittedly, there is absolutely no denial to the fact that the petitioner worked as helper with the respondent *w.e.f.* 14-10-2010 till 10-4-2014. It is not in dispute that the respondent had time and again raised the issue that the petitioner had worked as a contractual labour with the Vasistha Earth Works as is evident from the muster roll (RW-1/D) and (RW-1/E), which is month wise attendance of the petitioner. The muster roll is the month wise attendance detail of the petitioner who has worked as helper being a contractual employee purely temporary in nature. Thus, there is evidence available on record particularly the documents (RW-1/B), the copy of letter dated 1-4-2014, it could be legitimately held that it is the respondent Gangadhari who were allotted to into 8.0 MW, Jogini State Small Hydro Power Project-Synchronization Commissioning and achieving commercial operation of Power house *w.e.f.* 27-3-2014. In the said letter there is no reference to M/s Vasistha Earth Works. The only case pleaded from the side of the respondent is that since the civil, construction and fabrication works were allotted by the respondent to various contractors namely Vasistha Earth Works, Bajrang constructions, AK Raghu and Kali Bahadur and the petitioner and other workers had been engaged by contractors. It is proved on record that the petitioner had been engaged by the respondent on fixed salary of Rs. 3384/ per month. It appears that he had accepted such offer as per the full & final statement (RW-1/F). It is also admitted fact that the petitioner had worked continuously from 14-10-2010 till 10-4-2014 when the petitioner was paid full & final retrenchment compensation after giving the retrenchment notice. It is argued that such notice or compensation on account of his retrenchment was given by Vasistha Earth Works, therefore, it is Vasistha Earth Works who is responsible and not the respondent. It was vociferously argued by the petitioner that Shri Nirmal Kumar Yadav (RW-1) during his cross-examination has categorically admitted that the petitioner and other workers were issued identity cards by the respondent. He also halfheartedly feigned ignorance that the offer of appointment was issued by the respondent. He again feigned ignorance that the persons junior to the petitioner namely Prem Singh, Uttam Singh, Deep Kumar, Anil Kumar, Ranvir, Bhagat Singh, Dharam Singh and Yashpal are still working with the respondent. Thus, this admission automatically proved the case of the petitioner. The recital of the letter (RW-1/B) clearly shows that the respondent had been allotted the synchronization commissioning and achieving commercial operation of Power House. So far as concerning the engaging of various contractors to execute the work on contractual basis, it is admitted that the identity cards were issued by the respondent. The identity card (PW-1/A) clearly shows that the petitioner was the worker/employee of Gangadhari Hydro Power Project, which has been duly attested by the Labour Officer. It is the basic law that documentary evidence

as compelled oral evidence, has given to weight. Thereafter, as per full & final statement (RW-1/F), the petitioner had been paid the full & final payment towards retrenchment compensation on issuance of retrenchment notice by Vasistha Earth Works whereby the petitioner was shown to be helper and joined the company since 19-10-2010. The petitioner was engaged on fixed salary of Rs. 3708/- per month and worked continuously *w.e.f.* 19-10-2010 till 31-3-2014. As discussed above, as per identity card (PW-1/A) the petitioner is shown to have been employed as helper by the respondent *w.e.f.* 1-5-2011 wherein the necessary particulars of the petitioner were duly recorded. It is manifested that only after accepting the terms and conditions of the appointment, the petitioner had been working with the respondent as helper and had continuously worked till 31-3-2014. Therefore, the entire documentary proof placed on record duly unfold that the services of the petitioner had been engaged by the respondent company.

33. The petitioner as per his pleadings and evidence on record clarified that he was relieved from his duties by issuance of retrenchment notice on making retrenchment compensation as on 31-3-2014.

34. So far as concerning the retrenchment of a workman there are certain conditions, procedure which requires to be qualified as provided under section 25-F, 25-G and 25-H of the Act, which reads as under:

25F. Conditions precedent to retrenchment of workmen.—

No workman employed in any industry who has been in continuous service for not less than one year under an employer shall be retrenched by that employer until—

- (a) the workman has been given one month's notice in writing indicating the reasons for retrenchment and the period of notice has expired, or the workman has been paid in lieu of such notice, wages for the period of the notice:
- (b) the workman has been paid, at the time of retrenchment, compensation which shall be equivalent to fifteen days' average pay² for every completed year of continuous service or any part thereof in excess of six months; and
- (c) notice in the prescribed manner is served on the appropriate Government³ or such authority as may be specified by the appropriate Government by notification in the Official Gazette”.

25G. Procedure for retrenchment.—

Where any workman in an industrial establishment, who is a citizen of India, is to be retrenched and he belongs to a particular category of workmen in that establishment, in the absence of any agreement between the employer and the workman in this behalf, the employer shall ordinarily retrench the workman who was the last person to be employed in that category, unless for reasons to be recorded the employer retrenches any other workman.

25H. Re-employment of retrenched workmen.—

Where any workmen are retrenched, and the employer proposes to take into his employ any persons, he shall, in such manner as may be prescribed, give an opportunity to the retrenched workmen who are citizens of India to offer themselves for re-employment and such retrenched workman who offer themselves for re-employment shall have preference over other persons.

35. Section 25-B of the Act defines continuous service.—In terms of sub Section 2 of section 25-B, if a workman during a period of twelve calendar months preceding the date with reference to which calculations to be made has actually worked under the employer for a period of one year, he will deemed to be in continuous service. Admittedly, the petitioner had been working since May, 2010 till 31-3-2014, which burden of proof has been satisfactorily discharged by the petitioner that he had worked for 240 days in a calendar year which is the bench mark as settled by the **Hon'ble Apex Court in case titled R.M 2006 (1) SCC 106**. Similarly, it has been laid down by the **Hon'ble Apex Court in 2019 (1) SCC 138** that when the workman had worked for required 240 days of the working in the period of twelve calendar months preceding the date of dismissal, he is entitled to take the benefit of the provisions of section 25-F of the Act.

36. It is claimed by the petitioner that at the time of termination of his services, the persons junior to him were retained by the respondent. Shri Nirmal Kumar Yadav (RW-1) had feigned ignorance that persons junior to the petitioner namely Prem Singh, Uttam Singh, Deep Kumar, Anil Kumar, Ranvir, Bhagat Singh, Dharam Singh and Yashpal are still working with the respondent. A detail of such persons is also given in the statement of claim and rejoinder that junior persons namely Prem Singh, Uttam Singh, Deep Kumar, Anil Kumar, Ranvir, Bhagat Singh, Dharam Singh and Yashpal are still working with the respondent. Though, the respondent has refuted such allegations and claimed that no persons junior to the petitioner had ever been retained. There is no iota of evidence led by the respondent before this Tribunal to prove that no person junior to the petitioner had been retained/engaged in service by the respondent. Though, no seniority list has been proved/placed on record by the petitioner but his oral evidence to the effect that persons junior to him were retained by the respondent and after his retrenchment, they are still working with the respondent. This contention of the petitioner has gone unrebutted and unchallenged, hence, the version of the petitioner that after his termination, persons junior to him were retained by the respondent has to be accepted.

37. Since, the provisions of sections 25-G and 25-H have been contravened, it was not obligatory for the petitioner to have completed 240 days in a block/calendar year. Here, I am fortified by the judgment rendered by our own Hon'ble High Court in case **State of H.P. Vs. Pratap Singh, 2017 (1) HLR 286**. Thus, it can be safely concluded that the respondent has contravened the provisions of section 25-G of the Act as such the termination of the services of the petitioner is held to be illegal and unjustified.

38. However, the allegations set forth from the side of the petitioner that the respondent had violated the provisions of section 25-H, to my mind does not bears to have been substantive. In the petitioner's evidence as PW-1, he has failed to name those persons who have engaged after his retrenchment. The all material placed on record, thus, being too nebulous to lend any credence to the allegations put forth by the petitioner that new workmen were employed without affording opportunity to the petitioner being retrenched employee for such employment after the termination of the services of the petitioner. Therefore, the respondent cannot be said to have violated the provisions of section 25-H of the Act.

39. Thus, in view of my above discussion, I have no hesitation in holding that the services of the petitioner *w.e.f.* 31-3-2014 have been illegally terminated by the respondent without following the provisions of the Act. Accordingly all these issues are decided in favour of the petitioner and against the respondent.

Issue No. 2 :

40. Since, I have held under issue No.1 above that the services of the petitioner have been illegally terminated by the respondent without complying with the provisions of section 25-F and

25-G of the Act, it is ordered that he be reinstated in service with seniority and continuity. Now, the question which arises for consideration, before this Court is as to whether the petitioner is entitled to full back wages as contended by the learned counsel for the petitioner. In **(2009) 1 SCC 20, Kanpur Electricity Supply Company Limited Vs. Shamim Mirza**, the Hon'ble Apex Court has held that once the order of termination of services of an employee is set-aside, ordinarily, the relief of reinstatement is available to him. However, the entitlement of an employee to get reinstated does not necessarily result in payment of full or partial back-wages, which is independent of reinstatement. It has further been held by the **Hon'ble Apex Court in 2010 (1) SLJ S.C. 70, M/s Ritu Marbals Vs. Prabhakant Shukla** that full back wages cannot be granted mechanically, upon an order of termination be declared illegal. It is further held that reinstatement must not be accompanied by payment of full back wages even for the period when the workman remained out of service and contributed little or nothing to the Industry.

41. Moreover, the petitioner was under an obligation to prove by leading cogent evidence that he was not gainfully employed after the termination of his services. The initial burden is on the workman/employee to show that she was not gainfully employed as held by the **Hon'ble Apex Court in (2005) 2 Supreme Court Cases 363 titled as Kendriya Vidyalaya Sangathan and another Vs. S.C Sharma** that:

16. "When, the question of determining the entitlement of a person to back-wages is concerned, the employee has to show that he was not gainfully employed. The initial burden is on him. After and if he places materials in that regard, the employer can bring on record materials to rebut the claim"

42. For the foregoing reasons, the petitioner has failed to discharge his burden by placing any material on record that he was not gainfully employed after his termination/disengagement.

43. In view of the entire evidence, on record, coupled with the rulings (supra), I have no hesitation in holding that the petitioner is entitled for **reinstatement in service with continuity and seniority. However, the petitioner is not entitled to any back-wages.** Hence, this issue is decided in favour of the petitioner and against the respondent.

Issue No. 3 & 4 :

44. Being interlinked and correlated both these issues are taken up together for discussion and decision.

45. A conjoint reading of Clause G and Clause S of section 2 of the Act would clearly embarked that the workman is a person who has been employed for any manual, unskilled, skilled, technical, operational, clerical or supervisory work for hire or reward, where the terms of employment be expressed or implied and for the purpose of any proceeding under this Act in relation to an industrial dispute, includes any such person who has been dismissed, discharged or retrenched in connection with, or as a consequence of, that dispute, or whose dismissal, discharge or retrenchment has led to that dispute. Similarly, where there is in relation to an industry carried on by or under the authority of any department Government or a State Government, the authority prescribed in this behalf, or where no authority is prescribed, to be an employer. Clause (j), of the Act provides that any business, trade, undertaking, manufacture or calling of employers and includes any calling service employment, handicraft or industrial occupation or avocation of workmen shall be termed as "industry". Therefore, as per the words embodied in clauses g, j and s of the Act, would clearly emancipate that there is a clear cut relationship of employer and employee between the petitioner and the respondent company. The identity cards were issued in the name of the Gangadhari and mere mentioning the name of its contractor M/s Vasistha Earth Works would

tantamount as a comaflauge and nothing else. Accordingly, both these issues are decided in favour of the petitioner and against the respondent.

Issue No. 5 :

46. In support of this issue, no evidence was led by the respondent being the legal issue. However, I have scrutinized the record of the case and observed that there is no limitation under the Industrial Disputes Act, 1947 as it was held by their lordship of **Hon'ble Supreme Court in a case reported in (1999) 6 SCC 82 incase titled as Ajayab Singh Vs. Sirhind Co-operative Marketing-cum-processing Service Society Limited and Another** in which it was held that—

“the provisions of Article 137 of Limitation Act, 1963 are not applicable to the proceedings under the ID Act. The relief under the ID Act cannot be denied merely on the ground of delay. The plea of delay if raised by the employer is required to be proved as a matter of fact by showing the real prejudice and not as a merely hypothetical defence. No reference to the Labour Court can be generally questioned on the ground of delay alone”

47. Thus, on the strength of above ruling, it can safely be concluded that this petition is not barred by limitation. Accordingly, this issue is decided in favour of the petitioner and against the respondent.

Issue No. 7 :

48. In support of this issue, no evidence has been led by the respondent. However, the petitioner has filed this claim petition pursuant to the reference made by the appropriate government to this Court for adjudication. I find nothing wrong with this petition which is legally maintainable. Accordingly, this issue is decided in favour of the petitioner and against the respondent.

Relief :

49. As a sequel to my above discussion and findings on issues No. 1 to 7, the claim of the petitioner succeeds and is hereby partly allowed resultantly the petitioner is ordered to be **reinstatement in service forthwith with seniority and continuity**. However the petitioner is not entitled to back wages. The reference is ordered to be partly answered in favour of the petitioner and against the respondent. Let a copy of this award be communicated to the appropriate government for publication in official gazette. File, after completion, be consigned to records. Ordered accordingly.

Announced in the open Court today this 1st day of November, 2021.

Sd/-
(RAJESH TOMAR),
Presiding Judge,
Industrial Tribunal-cum- Labour Court, Shimla.

**IN THE COURT OF SHRI RAJESH TOMAR PRESIDING JUDGE, H.P. INDUSTRIAL
TRIBUNAL-CUM-LABOUR COURT, SHIMLA**

Reference Number : 189 of 2018

Instituted on : 1-12-2018

Decided on :

1-11-2021

Umesh Kumar S/o Shri Gopal r/o Village Karda, P.O Danoghat, Tehsil Arki District Solan,
H.P.Petitioner.

Versus

The Managing Director, Himachal Pradesh Tourism Development Corporation, Near Ritz
Shimla H.P.Respondent.

Reference under Section 10 of the Industrial Disputes Act, 1947

For the Petitioner : Shri R.K Khidtta, Advocate

For the Respondent : Shri Kartik Kumar, Advocate

AWARD

The following reference petition has been, received from the Appropriate Government for final adjudication:

“Whether termination of services of Shri Umesh Kumar s/o Shri Gopal r/o Village Karda, P.O Danoghat, Tehsil Arki, District Solan, H.P. who had worked as Washer Boy, by the Managing Director, Himachal Pradesh Tourism Development Corporation, Near Ritz Shimla-1 w.e.f. 17-11-2013 without complying with the provisions of the Industrial Disputes Act, 1947, as alleged by the workman, is legal and justified? If not, what relief including reinstatement, amount of back-wages, past service benefits and compensation the above ex-worker is entitled to from the above employer?”

2. On receipt of the said reference from the Appropriate Government, notices were issued to the concerned parties in pursuance to which the petitioner has filed the statement of claim.

3. The case of the petitioner as it emerges from the statement of claim is that the petitioner was engaged as “Utility worker” in the month of May, 2012 in the transport wing of HPTDC work shop Ghora Chowki for 89 days and worked as such till 16-11-2013 continuously and thereafter his services were illegally terminated and after some time w.e.f. 24-4-2014, the petitioner was re-engaged and worked till 30-9-2018 but he has been shown to be re-engaged through contractor whereas he was engaged by the respondent Corporation as the attendance of the petitioner was verified and signed by the official of the Corporation. The leave was also sanctioned by the official of the Corporation and the petitioner was under the direct supervision and control of the Corporation. It is further averred that the services of the petitioner have been orally terminated by the respondent firstly w.e.f. 16-11-2013 and thereafter w.e.f. 30-9-2018 without following the mandatory provisions of the Industrial Disputes Act, 1947 (hereinafter referred to be as the Act) as no notice or pay in lieu of notice and retrenchment compensation has been paid to the petitioner as the petitioner is a workman as defined under the Act and he used to work manually with the Corporation. It is further averred that the petitioner worked with utmost honesty and dedication and his work was always appreciated by the official of the respondent Corporation and nothing contrary was ever conveyed to him. The Corporation intentionally used to give fictional breaks to the petitioner which was totally illegal as the work which he had performed was continuous in nature and is still available with the respondent Corporation. It is averred that on 17-11-2013, the petitioner was not allowed to work and his services were orally terminated and on his request to re-

engage him on the same post with all benefits, he was re-engaged after seven months but no seniority and continuity was not given to him and ultimately his services were again terminated w.e.f. 30-9-2018. After his illegal termination, the petitioner visited the office of the respondent number of time and requested to re-engage him but of no avail and he was forced to file demand notice before the Labour Inspector-cum-Conciliation Officer, Shimla in which the respondent was duly served. Since, the petitioner had completed 240 days in a calendar year and his juniors are still working with the respondent and even the respondent Corporation failed to follow the principles of “Last Come First Go” and as such his termination is totally against the mandatory provisions of sections 25-F, 25-G and 25-H of the Act and after the illegal termination of the petitioner, he is unemployed.

4. It is therefore prayed from the side of the petitioner that the impugned termination order dated 17-11-2013 and 30-9-2018 passed by the respondent Corporation may kindly be quashed and set-aside and the respondent may kindly be directed to re-instate the petitioner in service with all service benefits including full back-wages and his services may be ordered to be regularized as he has already completed six years of service with the respondent. It is further prayed that the respondent may also be burdened with the cost of litigation amounting to ` 30,000/- and to pay the damages amounting to ` 50,000/- for the harassment caused to the petitioner and his family members due to their illegal action. It is also prayed that any other order which deem just and proper in the resent facts and circumstances of the case/reference may also be passed in favour of the petitioner and against the respondent and justice be done with the petitioner.

5. On notice, the respondent Corporation appeared and filed reply to the claim petition by asserting preliminary objections regarding guilty of suppressions veri suggestio falsi, no relationship of employer and employee, maintainability, there exists no industrial dispute, no cause of action, claim is a blatant misuse of the judicial process, estoppel and failed to implead M/s Corporate Care as necessary party.

6. On merits, the petitioner was initially engaged as a seasonal worker as a utility worker as per the agreements dated 17-12-2012, in the transport wing of HPTDC Workshop Ghora Chowki, Shimla. He did not work continuously from May 2012 till November 2013. It is denied that the services of the petitioner were illegally terminated and were re-engaged w.e.f. 24-4-2014 to 30-9-2018. It is pertinent to mention that after notification dated 17-12-2013, the respondent never hire any worker at their own and the respondent seek services of the outsourcing agencies for this purpose. It is denied that the respondent initially used to give fictional breaks to the petitioner which was totally illegal as the work performed by the petitioner was continuous in nature and is still available. It is further denied that the petitioner was not allowed to work and his services were terminated without complying with the mandatory provisions of the Act on 17-11-2013. The petitioner has no legal right or authority to file demand notice. It is denied that the petitioner has already completed 240 days each calendar year. It is also denied that the termination of the services of the petitioner is illegal, arbitrary and unjust.

7. In view of submissions made hereinabove, it is prayed that the claim petition is liable to be dismissed.

8. While filing rejoinder, the petitioner controverted the averments made thereto in the reply and reaffirmed and reiterated those in the statement of claim.

9. On elucidating the pleading of parties, the following issues were struck down by my Learned Predecessor for its final determination *vide* Court order dated 3-7-2019.

1. *Whether the termination of services of the petitioner w.e.f. 17-11-2013 is violative of the provisions of the Industrial Disputes Act, as alleged. If so, its effect thereto? . .OPP.*
2. *Whether the petitioner has approached this Court with unclean hands and suppressed material facts from this Court as alleged? If so its effect thereto? . .OPR.*

3. Whether the claim is not maintainable as it is stated to be barred by limitation as alleged? If so, its effect thereto? . . . *OPR.*
4. Whether the petition is bad for non-joinder/mis-joinder of necessary parties, as alleged? If so, its effect thereto? . . . *OPR.*
5. Whether the reference is not maintainable and the petitioner is estopped from filing of claim as he was engaged on seasonal basis, as alleged? If so its effect thereto? . . . *OPR.*
6. Relief

10. Henceforth, parties to the dispute were asked to adduce oral as well as documentary evidence in support of their respective claims or issues so framed.

11. Arguments of the Learned Counsel for the petitioner as well as Learned Counsel for respondent were heard and gone through the case record with minute care, caution circumspection.

12. For the reasons to be recorded hereinafter while discussing the aforesaid issues, my findings on the aforesaid issues are as follows:

<i>Issue No. 1 :</i>	<i>Partly Yes</i>
Issue No. 2 :	No
Issue No. 3 :	No
Issue No. 4 :	No
Issue No. 5 :	No
Relief :	Reference is partly allowed per operative part of the Award

REASONS FOR FINDINGS

Issues No.1 & 3 :

13. Being interlinked and inter-connected both these issues are taken up together for discussion and decision.

14. At the very inception, there is no denial of the fact that the relationship of the petitioner having been engaged as daily wager/contract worker to supplement its manpower requirement during season which shall be commenced from the date of agreement and shall automatically terminated after expiring of 89 days. As a matter of fact, the petitioner will perform such unskilled work on casual basis which may be assigned to him in the Transport Wing of the respondent. The contractual work shall be automatically terminated after the completion of 89 days and no formal notice/order will be required to be given by either party for the termination of agreement. It is mint for seasonal and specific period and shall not claim the renewal of his engagement as casual worker. It is further agreed that the extension of the agreement will be at the sole discretion of the respondent Corporation. The petitioner shall be deployed from time to time and obey the orders, instructions or directions issued by the respondent Corporation from time to time. The petitioner will be entitled for payment of ` 120/- only per day. It is also agreed between the parties that the agreement shall be terminated in case the respondent Corporation finds the petitioner to be prima-

facie guilty of any insubordination, moral turpitude or other misconduct or breach of any condition of agreement or is otherwise found unsuitable for the job, the respondent reserves its right to terminate the agreement. It is further agreed upon the said agreement that any right to claim for his absorption in the Corporation against regular vacancy that may exist or arise in the future. It is not in dispute that no written order was passed while terminating the services of the petitioner as the claim of the respondent remains that it had not retrenched the petitioner from service who had abandoned the job of his own and used to work intermittently as per his own wish and convenience. Admittedly, the reference of the Appropriate Government does not at all relate to plea of fictional breaks but only with regard to petitioner's termination from service. In the backdrop of the said events of foregoing admitted facts on record, the claim of petitioner requires to be adjudicated with a view to determine if petitioner is entitled for relief of reinstatement and back wages along-with seniority and past service benefits and compensation as claimed by him.

15. The petitioner while stepping into witness box as PW-1, tendered in evidence his sworn affidavit (PW-1/A), reiterating and affirming his pleadings as stipulated in the petition. In his attested affidavit, the petitioner has claimed that he worked as "Utility Worker/Washer Boy" *w.e.f.* May, 2012 till 16-11-2013. His services were orally terminated *w.e.f.* 17-11-2013 without complying with the mandatory provisions of the Act as no notice or pay lieu of notice or retrenchment compensation has been paid to him. He has also stated that he has worked with utmost honesty and dedication. He was not allowed to work since 17-11-2013 despite repeated requests. He filed demand notice before the Conciliation Officer against his illegal termination. The termination of the services by the respondent is totally illegal as the respondent has not followed the mandatory provisions of the Act. He has completed 240 days in each calendar year, hence, the termination of his services is illegal, unjust, arbitrary and against the mandatory provisions of the Act. He therefore, entitled for the benefits of reinstatement of service with full back-wages and all other consequential service benefits. The petitioner has further alleged, on oath, that the respondent Corporation after terminating his services in the year 2013 had engaged several other workers who are junior to him and retained in service. Not only those persons who are junior to him, the respondent had engaged new person namely Surender Kumar. The respondent had not followed the mandatory provisions of sections 25-F, 25-G and 25-H of the Act which were obligatory on its part. No notice was served upon him. The petitioner had moved before the Labour-cum-Conciliation Officer and raised demand notice, consequent upon which the Labour Commissioner made reference for industrial dispute raised by the petitioner. He has been subjected to mental harassment and financial loss to which the respondent is liable to pay damages to the tune of ` five lakhs along-with litigation costs.

16. In cross-examination, the petitioner denied that he had worked for 89 days only *i.e.* *w.e.f.* May, 2012 to 16-11-2013. He further denied that he was called for seasonal work as and when work was available with the respondent. He also denied that after 2013 the respondent used to engage workers through contractors. He denied that he had not completed 240 days in any calendar year.

17. Another witness examined on behalf of the petitioner is Man Singh (PW-2), Senior Assistant of Respondent Corporation who has testified that the petitioner was initially appointed on 1-5-2012 and worked till 16-11-2013 as per the mandays chart (PW-2/A). The details of the CPF contribution of the petitioner for the year 2012-2013 paid by the respondent is reflected *vide* Ex. PW-2/B. One Surender Kumar has been re-engaged by the Corporation in the year 2014 through outsource agency.

18. On the other hand, the respondent Corporation examined one Shri Man Singh, Senior Assistant (RW-1) who has tendered in evidence his affidavit (RW-1/A). He also tendered in

evidence authority letter (RW-1/B), copies of agreements dated 1-5-2012, 17-12-2012, 28-3-2013 and 18-9-2013 (RW-1/C to RW-1/F) and copy of notification (RW-1/G).

19. In cross-examination he admitted that the petitioner was engaged as utility worker with the respondent corporation since May, 2012. He further admitted that the services of the petitioner were terminated on 16-11-2013. He also admitted that no notice or compensation was paid to the petitioner before terminating his services and that no enquiry was conducted prior to his termination. He admitted that after 24-4-2014, the services of the petitioner have been shown to be engaged on out-source basis through contractor and no notice under section 9-A of the Act was issued to him before changing his service conditions. He admitted that as per the reply dated 30-10-2017 (PX), Surender Kumar was engaged as utility worker as mentioned in para 3 of the reply. He admitted that the work of utility is being dispensed with in the respondent Corporation since 2012. He admitted that as per reply the Corporation maintains the attendance and leave record and that the petitioner was working under the supervision and direction of the respondent. However, this witness denies that the petitioner worked till 16-11-2013 continuously. He further denied that the petitioner has completed 240 working days continuously prior to his termination on 17-11-2013 and also in preceding twelve months. He denied that notification (RW-1/G) was issued to those workers who have been engaged after the year 2013 and that the notification (RW-1/G) was not applicable to the workers working prior to 2013. He denied that the petitioner was engaged by the respondent on 24-4-2014 and terminated on 30-9-2018 without serving any notice or compensation. This witness also denied that the Corporation used to give fictional breaks to the petitioner intentionally so that he could not complete 240 days in a calendar year. He expressed his ignorance that the services of Dinesh Thakur, Santosh Devi and Yashwant Singh junior to the petitioner were regularized by the Corporation.

20. It is pertinent to mention here that the plea of abandonment raised by the respondent is concerned, the same merits rejection in view of the fact that respondent had failed to produce any record by which it could be established that whenever petitioner absented from his duty as also reflected in mandays chart (PW-2/A) no notice was ever issued to him. As such, in absence of any specific and reliable evidence led by respondent, it would be unsafe to hold that respondent had established plea of abandonment.

21. Verily, an overall assessment, analysis and synthesis of the mandays chart (PW-2/A) would reveal that petitioner had worked for 104 days in the year 2012 and 223 days in the year 2013. Thus it is clear that the petitioner had worked for 104 days in the year 2012 and 223 days in the year 2013 and as there is no reference from the Labour Commissioner, Shimla on the point of artificial breaks, this Court is to confine its findings only with regard to alleged illegal termination. It is evident from mandays chart (PW-2/A) that in the year 2013 the petitioner had merely worked for 223 days and thus immediately in preceding 12 calendar months from the month of termination of petitioner had not rendered service of 240 days so as to meet requirement of law of having continuous service of one year and thus it was not at all required from respondent to have issued a notice envisaged under Section 25-F of the Act. As such, the respondent is held to have not violated the provisions of Section 25-F of the Act.

22. Ld. Counsel for petitioner has contended with vehemence that large number of workers who were junior to petitioner had been appointed and these workers have been retained in service and regularized. The grievance of petitioner remains that principle of 'Last come First go' was not followed as the juniors were retained and services of petitioner despite being senior was terminated without any valid reason. Evidently, there is no iota of evidence of respondent establishing that petitioner was called upon to join for service at any time after May, 2004 even at the time when junior persons were re-engaged. That being so the respondent had certainly violated the provisions of Section 25-G of the Act Ld. Authorized Representative for petitioner has placed reliance upon

judgment of **Central Bank of India vs. S. Satyam, 1996 (5) SCC 418** in which Hon'ble Apex Court has held that for the applicability of Section 25-G and 25-H of the Act, there was no necessity of claimant/petitioner to have worked for 240 days as in case of provisions of Section 25-F of the Act.

23. Per contra, repudiating claim of petitioner, the respondent, on the other hand, has made futile attempt to justify engagement of junior workers. As stated above that petitioner remained out of job after his termination but there is nothing authenticated in evidence suggesting that he remained without earning and petitioner as (PW1) has nowhere stated that he had opted out for job when terminated from service. As such, it is held that after his termination he was not in government job and cross-examination of (PW1) reveals that he had not been paid retrenchment compensation and notice at the time of retrenchment. Since the respondent had failed to prove on record any seniority list by which it would be stated that persons who were junior to petitioner were retained in service whereas petitioner who was senior and thus respondent had clearly violated Section 25-G of Industrial Disputes Act. In view of ratio of judgment of Hon'ble Apex Court reported in **2015 (4) SCC 544** titled as **Mackinnon Machenzie & Company Ltd. vs. Mackinnon Employees Union** which mandatorily requires the employer to circulate seniority list as prepared. There is no iota of evidence on record remotely suggesting that respondent had provided seniority list of daily waged workers. As such, plea of petitioner that he was ignored and new hands were allowed to join is to be accepted. In view of foregoing discussions, respondent is held to have violated the provisions of Section 25-G and 25-H of the Industrial Disputes Act. As such, even when petitioner is proved to have not worked for more than 160 days in preceding four years which entitled him for regularization of his service per government policy, yet respondent is not absolved from its accountability of provisions of Section 25-G and 25-H of the Act and as such it is held that respondent had violated the provisions of Sections 25-G and 25-H of the Industrial Disputes Act.

24. Since, the termination of the petitioner having been held to be in violation of the provisions of sections 25-G and 25-H of the Act, the next question which thus gains significance is as to what relief the petitioner is entitled to.

25. Recent trends, more particularly much after the year 2007 shows that grant of compensation in lieu of reinstatement has gained precedence, more particularly, where the services of the workmen have been terminated because of procedural defects. In the case in hand too the termination is found to be illegal in view of the provisions of sections 25-G and 25-H of the Act, the interest of justice would thus be met, in case the petitioner is granted compensation in lieu of reinstatement thereof. In this behalf support can ably be drawn from the judgment of the Hon'ble Supreme Court titled as **Bharat Sanchar Nigam Ltd. Vs. Bhurumal (2014) 7 SCC 177** and further reiterated lately in **P. Karupaiyah (dead) through Legal Representatives Vs. General Manager, Thruuvalluvar Transport Corporation Ltd. (2018) 12 SCC 663** and **Rashtrasant Tukdoji Maharaj Technical Education Samnsta, Nagpur Vs. Prashant Manikrao Kubitkar (2018) 12 SCC 294**.

26. Furthermore, Ld. Counsel representing respondent Corporation has also contended with vehemence that claim petition is barred by limitation as the same has been filed beyond the period of limitation without assigning any reasonable cause. It has been pointed that termination of petitioner in this case took place on 2012 and the industrial dispute was raised after several years of retrenchment. Repudiating the argument by Learned Counsel for respondent, Ld. counsel for the petitioner has placed reliance upon judgment reported in **2007 LHLJ 903 Hon'ble High Court of H.P. Bhatag Ram's case** in which it has been held that delay in raising dispute may be considered by court at the time of granting final relief however in various other judgments even longer delay has been condoned. **In Divisional Manager, HPFC & another vs. Garibu Ram, Latest HLJ 2007 (HP) 1160**, delay of more than 10 years was condoned besides Hon'ble High Court has held that principle of Limitation Act is not applicable to the industrial dispute. Similar view was taken

by Hon'ble Apex Court in **Ajayab Singh vs. Sirhind Co-operative Marketing-cum-Processing Society Limited and Another, (1999) 6 SCC 82** in which it has been held that the principle of Limitation Act, 1963 did not apply to the proceeding under the Industrial Disputes Act.

27. On elucidation of the above mentioned judgments, it has been contended that claim of petitioner cannot be defeated on the point of delay and laches. Repudiating arguments advanced by Ld. Counsel for the petitioner, Learned Counsel for respondent, has placed reliance upon the judgment of Hon'ble Apex Court titled as **Assistant Engineer, Rajasthan State Agriculture Marketing Board, Sub-Division Kota and Mohan Lal 2013 (9) SCR 91**, the relevant para of the judgment are produced below for reference:

21. Now, if the facts of the present case are seen, the position that emerges is this: the workman worked as a work-charged employee for a period from 1-11-1984 to 17-2-1986 (in all he worked for 286 days during his employment). The services of the workman were terminated with effect from 18-2-1986. The workman raised the industrial dispute in 1992, i.e. after 6 years of termination. The Labour Court did not keep in view admitted delay of 6 years in raising the industrial dispute by the workman. The judicial discretion exercised by the Labour Court is, thus, flawed and unsustainable. The Division Bench of the High Court was clearly in error in restoring the award of the Labour Court whereby reinstatement was granted to the workman. Though, the compensation awarded by the Single Judge was too low and needed to be enhanced by the Division Bench but surely reinstatement of the workman in the facts and circumstances is not the appropriate relief.

22. In our opinion, interest of justice will be subserved if in lieu of reinstatement, the compensation of Rs. 1,00,000/- (one lac) is paid by the appellant (employer) to the respondent (workman). We order accordingly. Such payment shall be made by the appellant to the respondent within six weeks from today failing which the same will carry interest @ 9% per annum.....”

28. Thus, from a careful examination of the entire pleadings and evidence of the case leading to the peculiar facts, circumstances and evidence vis-à-vis having gone through the rival contention of the Learned counsel for the parties, keeping in view the mandate of Hon'ble Apex Court in various judgments referred to above, it is held that delay in raising industrial dispute is definitely an important circumstance and court has to keep in mind while exercising discretion. In para Nos. 21 and 22 of judgment 2013 supra has referred to Gitam Singh's case reported in **2013 (5) SCC 136 titled as Assistant Engineer Rajasthan Development Corporation and another vs. Geetam Singh** observing that before exercising its judicial discretion, the Labour Court has to keep in view all relevant factors including the mode and manner of appointment, nature of employment, length of service, the ground on which termination has been set aside and the delay in raising industrial dispute before grant of relief in an industrial dispute. It was observed by the Hon'ble Apex Court in judgment (2013 supra) before that workman had worked for 286 days and had raised industrial dispute in 1992 whereas his services have been terminated in 1986 and he raised industrial dispute after six years. The Hon'ble Apex Court has held that though compensation awarded by Single Judge of the Hon'ble High Court was too low and liable to be enhanced by the Division Bench but surely reinstatement of the workman in the facts and circumstances is not the appropriate relief and thus Hon'ble Apex Court awarded a lump-sum of Rs. one lakh along-with interest @ 9% per annum if the respondent failed to make payment of compensation within six weeks from the date of judgment. In the case in hand before this court factors which have weighed are that the petitioner in all remained worked for 104 days in the year 2012 and 223 days in the year 2013 as per mandays chart (PW-2/A) on record and that the services of petitioner were disengaged in November 2013, who worked as utility worker and had raised

industrial dispute by issuance of demand notice after about 4 years. It is also pertinent to mention here that petitioner on the date of filing claim petition was ageing 25 years who has sufficient spell of life to work and earn his livelihood. Taking into consideration factors mentioned above in pursuance to judgments of Hon'ble Apex Court petitioner would not be entitled either for reinstatement or for back wages but compensation a lump-sum would be appropriate relief in view of judgment **2013 (9) SCR 91**. The judgments relied upon by Id. counsel for the petitioner on the matter of delay and laches is more or less settled law that claim of the petitioner could not be solely declined on the ground of delay and laches. Similarly, judgment of Hon'ble Apex Court in 2014 titled as Raghbir Singh's case also does not come to the rescue of the petitioner as in this judgment also the Hon'ble Apex Court has reiterated the mandate as given by the Hon'ble Apex Court in previous judgment in the year 2013 *i.e.* Assistant Engineer, Rajasthan State Agriculture Marketing Board, Sub-Division Kota and Mohan Lal's case. Similar view was reiterated by the Hon'ble Apex Court in judgment titled as **Vice Chancellor, Lucknow University, Lucknow, Uttar Pradesh v. Akhilesh Kumar Khare & another** reported in **2016 (1) SCC 521**. Both the issues are thus decided accordingly.

Issues No. 2 & 4. :

29. In support of these issues no evidence has been led by the respondent. Therefore, in the absence of any specific evidence on record, these issues are decided against the respondent.

Issue No. 5 :

30. There is nothing on record which may show as to why this petition is not maintainable. Since, pursuance to the reference made to this Court, the petitioner had filed the statement of claim, the same is held to be maintainable because this court is required to answer the reference. Even from the reply, which has been filed by the respondent, it is not revealed as to how the petitioner is estopped from filing this petition. Thus, this issue is decided in favour of the petitioner and against the respondent.

Relief :

31. For the foregoing reasons discussed hereinabove supra, the respondent is directed to pay an amount of ` 50,000/- (Fifty Thousand only) to the petitioner as lump sum compensation in lieu of his termination. The amount shall be paid within sixty days from the announcement of award failing which the respondent shall pay interest @ 9% per annum till the realization of the amount. Let a copy of this award be communicated to the appropriate government for publication in the official gazette. File, after completion, be consigned to records.

32. The reference is answered in the aforesaid terms. Ordered accordingly.

Announced in the open Court today this 1st day of November 2021.

Sd/-
(RAJESH TOMAR),
Presiding Judge,
Industrial Tribunal-cum-Labour Court, Shimla.

**IN THE COURT OF SHRI RAJESH TOMAR, PRESIDING JUDGE, H.P. INDUSTRIAL
TRIBUNAL-CUM-LABOUR COURT, SHIMLA**

Reference Number : 190 of 2018

Instituted on : 1-12-2018

Decided on : 1-11-2021

Rajinder Kumar s/o Shri Hari Ram, r/o Village Mangoo, Tehsil Arki, District Solan, H.P.
. *Petitioner.*

Versus

The Managing Director, Himachal Pradesh Tourism Development Corporation, Near Ritz,
Shimla, H.P. . *Respondent.*

Reference under Section 10 of the Industrial Disputes Act, 1947

For the Petitioner : Shri R.K Khidtta, Advocate

For the Respondent : Shri Kartik Kumar, Advocate

AWARD

The following reference petition has been, received from the Appropriate Government for final adjudication:

“Whether termination of services of Shri Rajinder Kumar s/o Shri Hari Ram r/o Village Mangoo, Tehsil Arki, District Solan, H.P. who had worked as Washer Boy, by the Managing Director, Himachal Pradesh Tourism Development Corporation, Near Ritz, Shimla-1 during April, 2013 without complying with the provisions of the Industrial Disputes Act, 1947, as alleged by the workman, is legal and justified? If not, what relief including reinstatement, amount of back-wages, past service benefits and compensation the above ex-worker is entitled to from the above employer?”

2. On receipt of the said reference from the Appropriate Government, notices were issued to the concerned parties in pursuance to which the petitioner has filed the statement of claim.

3. The case of the petitioner as it emerges from the statement of claim is that the petitioner was engaged as “Utility worker” in the year 2003 and worked as such till the year 2004 and thereafter the services of the petitioner were terminated and he was re-engaged in the month of October, 2010 in the transport wing of HPTDC work shop Ghora Chowki and worked as such till 9-9-2013 continuously and thereafter his services were again illegally terminated and after some time *w.e.f.* 24-4-2014, the petitioner was re-engaged and worked till 30-9-2018 but he has been shown to be re-engaged through contractor whereas he was engaged by the respondent Corporation as the attendance of the petitioner was verified and signed by the official of the Corporation. The leave was also sanctioned by the official of the Corporation and the petitioner was under the direct supervision and control of the Corporation. It is further averred that the services of the petitioner have been orally terminated by the respondent firstly in the year 2004 and thereafter *w.e.f.* 9-9-2013 and finally *w.e.f.* 30-9-2018 without following the mandatory provisions of the Industrial Disputes Act, 1947 (hereinafter referred to be as the Act) as no notice or pay in lieu of notice and

retrenchment compensation has been paid to the petitioner as the petitioner is a workman as defined under the Act and he used to work manually with the Corporation. It is further averred that the petitioner worked with utmost honesty and dedication and his work was always appreciated by the official of the respondent Corporation and nothing contrary was ever conveyed to him. The Corporation intentionally used to give fictional breaks to the petitioner which was totally illegal as the work which he had performed was continuous in nature and is still available with the respondent Corporation. It is averred that on 9-9-2013, the petitioner was not allowed to work and his services were orally terminated and on his request to re-engage him on the same post with all benefits, he was re-engaged after seven months but no seniority and continuity was not given to him and ultimately his services were again terminated *w.e.f.* 30-9-2018. After his illegal termination, the petitioner visited the office of the respondent number of time and requested to re-engage him but of no avail and he was forced to file demand notice before the Labour Inspector-cum-Conciliation Officer, Shimla in which the respondent was duly served. Since, the petitioner had completed 240 days in a calendar year and his juniors are still working with the respondent and even the respondent Corporation failed to follow the principles of "Last Come First Go" and as such his termination is totally against the mandatory provisions of sections 25-F, 25-G and 25-H of the Act and after the illegal termination of the petitioner, he is un-employed.

4. It is therefore prayed from the side of the petitioner that the impugned termination order firstly in the year 2004 thereafter *w.e.f.* 17-8-2013 and 30-9-2018 passed by the respondent Corporation may kindly be quashed and set-aside and the respondent may kindly be directed to re-instate the petitioner in service with all service benefits including full back-wages and his services may be ordered to be regularized as he has already completed six years of service with the respondent. It is further prayed that the respondent may also be burdened with the cost of litigation amounting to ` 30,000/- and to pay the damages amounting to ` 50,000/- for the harassment caused to the petitioner and his family members due to their illegal action. It is also prayed that any other order which deem just and proper in the resent facts and circumstances of the case/reference may also be passed in favour of the petitioner and against the respondent and justice be done with the petitioner.

5. On notice, the respondent Corporation appeared and filed reply to the claim petition by asserting preliminary objections regarding guilty of suppressions veri suggestio falsi, no relationship of employer and employee, maintainability, there exists no industrial dispute, no cause of action, claim is a blatant misuse of the judicial process, estoppel and failed to implead M/s Corporate Care as necessary party.

6. On merits, the petitioner was initially engaged as a seasonal worker for specific period as per the agreements dated 21-4-2011, 9-4-2011, 23-12-2011, 20-4-2012, 26-12-2012, 1-9-2012, 5-4-2013 and 12-7-2013, in the transport wing of HPTDC Workshop Ghora Chowki, Shimla. It is denied that the services of the petitioner were illegally terminated and were re-engaged *w.e.f.* 24-4-2014 to 30-9-2018. It is pertinent to mention that after notification dated 17-12-2013, the respondent never hire any worker at their own and the respondent seek services of the outsourcing agencies for this purpose. It is denied that the respondent initially used to give fictional breaks to the petitioner which was totally illegal as the work performed by the petitioner was continuous in nature and is still available. It is further denied that the petitioner was not allowed to work and his services were terminated without complying with the mandatory provisions of the Act on 17-8-2013. The petitioner has no legal right or authority to file demand notice. It is denied that the petitioner has already completed 240 days each calendar year. It is also denied that the termination of the services of the petitioner is illegal, arbitrary and unjust.

7. In view of submissions made hereinabove, it is prayed that the claim petition is liable to be dismissed.

8. While filing rejoinder, the petitioner controverted the averments made thereto in the reply and reaffirmed and reiterated those in the statement of claim.

9. On elucidating the pleading of parties, the following issues were struck down by my Learned Predecessor for its final determination *vide* Court order dated 3-7-2019 :

1. *Whether the termination of services of the petitioner w.e.f. 9-9-2013 is violative of the provisions of the Industrial Disputes Act, as alleged. If so, its effect thereto?* . . .*OPP.*
2. Whether the petitioner has approached this Court with unclean hands and suppressed material facts from this Court as alleged? If so its effect thereto? . . .*OPR.*
3. Whether the claim is not maintainable as it is stated to be barred by limitation as alleged? If so, its effect thereto? . . .*OPR.*
4. Whether the petition is bad for non-joinder/mis-joinder of necessary parties, as alleged? If so, its effect thereto? . . .*OPR.*
5. Whether the reference is not maintainable and the petitioner is estopped from filing of claim as he was engaged on seasonal basis, as alleged? If so its effect thereto? . . .*OPR.*
6. Relief

10. Henceforth, parties to the dispute were asked to adduce oral as well as documentary evidence in support of their respective claims or issues so framed.

11. Arguments of the Learned Counsel for the petitioner as well as Learned Counsel for respondent were heard and gone through the case record with minute care, caution circumspection.

12. For the reasons to be recorded hereinafter while discussing the aforesaid issues, my findings on the aforesaid issues are as follows:

<i>Issue No. 1 :</i>	<i>Partly Yes</i>
Issue No. 2 :	No
Issue No. 3 :	No
Issue No. 4 :	No
Issue No. 5 :	No
Relief :	Reference is partly allowed per operative part of the Award

REASONS FOR FINDINGS

Issues No. 1 & 3 :

13. Being interlinked and inter-connected both these issues are taken up together for discussion and decision.

14. At the very inception, there is no denial of the fact that the relationship of the petitioner having been engaged as daily wage/contract worker to supplement its manpower requirement

during season which shall be commenced from the date of agreement and shall automatically terminated after expiring of 89 days. As a matter of fact, the petitioner will perform such unskilled work on casual basis which may be assigned to him in the Transport Wing of the respondent. The contractual work shall be automatically terminated after the completion of 89 days and no formal notice/order will be required to be given by either party for the termination of agreement. It is mint for seasonal and specific period and shall not claim the renewal of his engagement as casual worker. It is further agreed that the extension of the agreement will be at the sole discretion of the respondent Corporation. The petitioner shall be deployed from time to time and obey the orders, instructions or directions issued by the respondent Corporation from time to time. The petitioner will be entitled for payment of ` 120/- only per day. It is also agreed between the parties that the agreement shall be terminated in case the respondent Corporation finds the petitioner to be prima-facie guilty of any insubordination, moral turpitude or other misconduct or breach of any condition of agreement or is otherwise found unsuitable for the job, the respondent reserves its right to terminate the agreement. It is further agreed upon the said agreement that any right to claim for his absorption in the Corporation against regular vacancy that may exists or arise in the future. It is not in dispute that no written order was passed while terminating the services of the petitioner as the claim of the respondent remains that it had not retrenched the petitioner from service who had abandoned the job of his own and used to work intermittently as per his own wish and convenience. Admittedly, the reference of the Appropriate Government does not at all relates to plea of fictional breaks but only with regard to petitioner's termination from service. In the backdrop of the said events of foregoing admitted facts on record, the claim of petitioner requires to be adjudicated with a view to determine if petitioner is entitled for relief of reinstatement and back wages along-with seniority and past service benefits and compensation as claimed by him.

15. The petitioner while stepping into witness box as PW-1, tendered in evidence his sworn in affidavit (PW-1/A), reiterating and affirming his pleadings as stipulated in the petition. In his attested affidavit, the petitioner has claimed that he worked as "Utility Worker/Washer Boy" in the year 2003 and worked as such till the year 2004 and thereafter he was re-engaged in the month of October 2009 and he worked as such till 9-9-2013 continuously and thereafter he also worked with the respondent *w.e.f.* 24-4-2014 till 1-7-2018. His services were orally terminated without complying with the mandatory provisions of the Act as no notice or pay lieu of notice or retrenchment compensation has been paid to him. He has also stated that he has worked with utmost honesty and dedication. He was not allowed to work since 1-7-2018 despite repeated requests. He filed demand notice before the Conciliation Officer against his illegal termination. The termination of the services by the respondent is totally illegal as the respondent has not followed the mandatory provisions of the Act. He has completed 240 days in each calendar year, hence, the termination of his services is illegal, unjust, arbitrary and against the mandatory provisions of the Act. He therefore, entitled for the benefits of reinstatement of service with full back-wages and all other consequential service benefits. The petitioner has further allege, on oath, that the respondent Corporation after terminating his services had engaged several other workers who are junior to him and retained in service. Not only those persons who are junior to him, the respondent had engaged new person namely Surender Kumar. The respondent had not followed the mandatory provisions of sections 25- F, 25-G and 25-H of the Act which were obligatory on its part. No notice was served upon him. The petitioner had moved before the Labour-cum-Conciliation Officer and raised demand notice, consequent upon which the Labour Commissioner make reference for industrial dispute raised by the petitioner. He has been subjected to mental harassment and financial loss to which the respondent is liable to pay damages to the Tune of ` five lakhs along-with litigation costs.

16. In cross-examination, the petitioner admitted that there is seasonal work with the respondent. He further admitted that after the year 2014 utility workers were engaged through contractor. He denied that he had not completed 240 days in any calendar year.

17. Another witness examined on behalf of the petitioner is Man Singh (PW-2), Senior Assistant, of Respondent Corporation who has testified that the petitioner was initially appointed on

1-10-2010 and worked till 9-9-2013 as per the mandays chart (PW-2/A). He further stated that as per record the petitioner has also worked on outsourcing with the respondent *w.e.f.* 14-5-2018 to 15-7-2018 and his CPF deduction were made as per (PW-1/B). One Surender Kumar is also working with the respondent *w.e.f.* 10-5-2011 through the outsourcing agency.

18. On the other hand, the respondent Corporation examined one Shri Man Singh, Senior Assistant (RW-1) who has tendered in evidence his affidavit (RW-1/A). He also tendered in evidence authority letter (RW-1/B), copies of agreements dated 21-4-2011, 4-9-2011, 20-4-2012, 26-12-2012, 1-9-2012, 5-4-2013 and 12-7-2013 (RW-1/C to RW-1/J) and copy of notification (RW-1/K).

19. In cross-examination he admitted that the petitioner was engaged as utility worker with the respondent corporation in the year 2003. He further admitted that the services of the petitioner were terminated on 9-9-2013. He also admitted that no notice or compensation was paid to the petitioner before terminating his services and that no enquiry was conducted prior to his termination. He admitted that after 24-4-2014, the services of the petitioner have been shown to be engaged on out-source basis through contractor and no notice under section 9-A of the Act was issued to him before changing his service conditions. He admitted that as per the reply dated 28-3-2018 (PX), Surender Kumar was engaged as utility worker as mentioned in para 3 of the reply. He admitted that the work of utility is being dispensed with in the respondent Corporation since 2012. He admitted that as per reply the Corporation maintains the attendance and leave record and that the petitioner was working under the supervision and direction of the respondent. However, this witness denies that the petitioner worked till 30-9-2018 continuously. He further denied that the petitioner has completed 240 working days continuously prior to his termination on 9-9-2013 and also in preceding twelve months. He denied that notification (RW-1/K) was issued to those workers who have been engaged after the year 2013 and that the notification (RW-1/K) was not applicable to the workers working prior to 2013. He denied that the petitioner was engaged by the respondent on 24-4-2014 and terminated on 30-9-2018 without serving any notice or compensation. This witness also denied that the Corporation used to give fictional breaks to the petitioner intentionally so that he could not complete 240 days in a calendar year. He expressed his ignorance that the services of Dinesh Thakur, Santosh Devi and Yashwant Singh junior to the petitioner were regularized by the Corporation.

20. It is pertinent to mention here that the plea of abandonment raised by the respondent is concerned, the same merits rejection in view of the fact that respondent had failed to produce any record by which it could be established that whenever petitioner absented from his duty as also reflected in mandays chart (PW-2/A) no notice was ever issued to him. As such, in absence of any specific and reliable evidence led by respondent, it would be unsafe to hold that respondent had established plea of abandonment.

21. Verily, an overall assessment, analysis and synthesis of the mandays chart (PW-2/A) would reveal that petitioner had worked for 89 days in the year 2010, 186 days in the year 2011, 237 days in the year 2012 and 232 days in the year 2013. Thus it is clear that the petitioner had worked for 89 days in the year 2010, 186 days in the year, 2011, 237 days in the year 2012 and 232 days in the year 2013 and as there is no reference from the Labour Commissioner, Shimla on the point of artificial breaks, this Court is to confine its findings only with regard to alleged illegal termination. It is evident from mandays chart (PW-2/A) that in the year 2013 the petitioner had merely worked for 232 days and thus immediately in preceding 12 calendar months from the month of termination of petitioner had not rendered service of 240 days so as to meet requirement of law of having continuous service of one year and thus it was not at all required from respondent to have issued a notice envisaged under Section 25-F of the Act. As such, the respondent is held to have not violated the provisions of Section 25-F of the Act.

22. Ld. Counsel for petitioner has contended with vehemence that large number of workers who were junior to petitioner had been appointed and these workers have been retained in service and regularized. The grievance of petitioner remains that principle of 'Last come First go' was not followed as the juniors were retained and services of petitioner despite being senior was terminated without any valid reason. Evidently, there is no iota of evidence of respondent establishing that petitioner was called upon to join for service at any time after May, 2004 even at the time when junior persons were reengaged. That being so the respondent had certainly violated the provisions of Section 25-G of the Act. Ld. Authorized Representative for petitioner has placed reliance upon judgment of **Central Bank of India vs. S. Satyam. 1996 (5) SCC 418** in which Hon'ble Apex Court has held that for the applicability of Section 25-G and 25-H of the Act, there was no necessity of claimant/petitioner to have worked for 240 days as in case of provisions of Section 25-F of the Act.

23. Per contra, repudiating claim of petitioner, the respondent, on the other hand, has made futile attempt to justify engagement of junior workers. As stated above that petitioner remained out of job after his termination but there is nothing authenticated in evidence suggesting that he remained without earning and petitioner as (PW1) has nowhere stated that he had opted out for job when terminated from service. As such, it is held that after his termination he was not in government job and cross-examination of (PW1) reveals that he had not been paid retrenchment compensation and notice at the time of retrenchment. Since the respondent had failed to prove on record any seniority list by which it would be stated that persons who were junior to petitioner were retained in service whereas petitioner who was senior and thus respondent had clearly violated Section 25-G of Industrial Disputes Act. In view of ratio of judgment of Hon'ble Apex Court reported in **2015 (4) SCC 544** titled as **Mackinnon Mackenzie & Company Ltd. vs. Mackinnon Employees Union** which mandatorily requires the employer to circulate seniority list as prepared. There is no iota of evidence on record remotely suggesting that respondent had provided seniority list of daily waged workers. As such, plea of petitioner that he was ignored and new hands were allowed to join is to be accepted. In view of foregoing discussions, respondent is held to have violated the provisions of Section 25-G and 25-H of the Industrial Disputes Act. As such, even when petitioner is proved to have not worked for more than 160 days in preceding four years which entitled him for regularization of his service per government policy, yet respondent is not absolved from its accountability of provisions of Section 25-G and 25-H of the Act and as such it is held that respondent had violated the provisions of Sections 25-G and 25-H of the Industrial Disputes Act.

24. Since, the termination of the petitioner having been held to be in violation of the provisions of sections 25-G and 25-H of the Act, the next question which thus gains significance is as to what relief the petitioner is entitled to.

25. Recent trends, more particularly much after the year 2007 shows that grant of compensation in lieu of reinstatement has gained precedence, more particularly, where the services of the workmen have been terminated because of procedural defects. In the case in hand too the termination is found to be illegal in view of the provisions of sections 25-G and 25-H of the Act, the interest of justice would thus be met, in case the petitioner is granted compensation in lieu of reinstatement thereof. In this behalf support can ably be drawn from the judgment of the Hon'ble Supreme Court titled as **Bharat Sanchar Nigam Ltd. Vs. Bhurumal (2014) 7 SCC 177** and further reiterated lately in **P. Karupiah (dead) through Legal Representatives Vs. General Manager, Thruvulluvar Transport Corporation Ltd. (2018) 12 SCC 663** and **Rashtrasant Tukdoji Maharaj Technical Education Samstha, Nagpur Vs. Prashant Manikrao Kubitkar (2018) 12 SCC 294**.

26. Furthermore, Ld. Counsel representing respondent Corporation has also contended with vehemence that claim petition is barred by limitation as the same has been filed beyond the period of limitation without assigning any reasonable cause. It has been pointed that termination of

petitioner in this case took place on 2012 and the industrial dispute was raised after several years of retrenchment. Repudiating the argument by Learned Counsel for respondent, ld. counsel for the petitioner has placed reliance upon judgment reported in **2007 LHLJ 903 Hon'ble High Court of H.P. Bhatag Ram's case** in which it has been held that delay in raising dispute may be considered by court at the time of granting final relief however in various other judgments even longer delay has been condoned. **In Divisional Manager, HPFC & another vs. Garibu Ram, Latest HLJ 2007 (HP) 1160**, delay of more than 10 years was condoned besides Hon'ble High Court has held that principle of Limitation Act is not applicable to the industrial dispute. Similar view was taken by Hon'ble Apex Court in **Ajayab Singh vs. Sirhind Co-operative Marketing-cum-Processing Society Limited and Another (1999) 6 SCC 82** in which it has been held that the principle of Limitation Act, 1963 did not apply to the proceeding under the Industrial Disputes Act.

27. On elucidation of the above mentioned judgments, it has been contended that claim of petitioner cannot be defeated on the point of delay and laches. Repudiating arguments advanced by Ld. Counsel for the petitioner, Learned Counsel for respondent, has placed reliance upon the judgment of Hon'ble Apex Court titled as **Assistant Engineer, Rajasthan State Agriculture Marketing Board, Sub-Division Kota and Mohan Lal 2013 (9) SCR 91**, the relevant para of the judgment are produced below for reference:

21. Now, if the facts of the present case are seen, the position that emerges is this: the workman worked as a work-charged employee for a period from 1-11-1984 to 17-2-1986 (in all he worked for 286 days during his employment). The services of the workman were terminated with effect from 18-2-1986. The workman raised the industrial dispute in 1992, i.e. after 6 years of termination. The Labour Court did not keep in view admitted delay of 6 years in raising the industrial dispute by the workman. The judicial discretion exercised by the Labour Court is, thus, flawed and unsustainable. The Division Bench of the High Court was clearly in error in restoring the award of the Labour Court whereby reinstatement was granted to the workman. Though, the compensation awarded by the Single Judge was too low and needed to be enhanced by the Division Bench but surely reinstatement of the workman in the facts and circumstances is not the appropriate relief.

22. In our opinion, interest of justice will be subserved if in lieu of reinstatement, the compensation of Rs.1,00,000/- (one lac) is paid by the appellant (employer) to the respondent (workman). We order accordingly. Such payment shall be made by the appellant to the respondent within six weeks from today failing which the same will carry interest @ 9% per annum.....”

28. Thus, from a careful examination of the entire pleadings and evidence of the case leading to the peculiar facts, circumstances and evidence vis-à-vis having gone through the rival contention of the Learned counsel for the parties, keeping in view the mandate of Hon'ble Apex Court in various judgments referred to above, it is held that delay in raising industrial dispute is definitely an important circumstance and court has to keep in mind while exercising discretion. In para Nos. 21 and 22 of judgment 2013 *supra* has referred to Gitam Singh's case reported in **2013 (5) SCC 136** titled as **Assistant Engineer Rajasthan Development Corporation and another vs. Geetam Singh** observing that before exercising its judicial discretion, the Labour Court has to keep in view all relevant factors including the mode and manner of appointment, nature of employment, length of service, the ground on which termination has been set aside and the delay in raising industrial dispute before grant of relief in an industrial dispute. It was observed by the Hon'ble Apex Court in judgment (2013 *supra*) before that workman had worked for 286 days and had raised industrial dispute in 1992 whereas his services have been terminated in 1986 and he raised industrial dispute after six years. The Hon'ble Apex Court has held that though compensation

awarded by Single Judge of the Hon'ble High Court was too low and liable to be enhanced by the Division Bench but surely reinstatement of the workman in the facts and circumstances is not the appropriate relief and thus Hon'ble Apex Court awarded a lump-sum of Rs. one lakh along-with interest @ 9% per annum if the respondent failed to make payment of compensation within six weeks from the date of judgment. In the case in hand before this court factors which have weighed are that the petitioner in all remained worked for 89 days in the year, 2010, 186 days in the year 2011, 237 days in the year 2012 and 232 days in the year 2013 as per mandays chart (PW-2/A) on record and that the services of petitioner were disengaged in September 2013, who worked as utility worker and had raised industrial dispute by issuance of demand notice after about 4 years. It is also pertinent to mention here that petitioner on the date of filing claim petition was ageing 52 years who has sufficient spell of life to work and earn his livelihood. Taking into consideration factors mentioned above in pursuance to judgments of Hon'ble Apex Court petitioner would not be entitled either for reinstatement or for back wages but compensation a lump-sum would be appropriate relief in view of judgment **2013 (9) SCR 91**. The judgments relied upon by ld. counsel for the petitioner on the matter of delay and laches is more or less settled law that claim of the petitioner could not be solely declined on the ground of delay and laches. Similarly, judgment of Hon'ble Apex Court in 2014 titled as Raghubir Singh's case also does not come to the rescue of the petitioner as in this judgment also the Hon'ble Apex Court has reiterated the mandate as given by the Hon'ble Apex Court in previous judgment in the year 2013 i.e. Assistant Engineer, Rajasthan State Agriculture Marketing Board, Sub-Division Kota and Mohan Lal's case. Similar view was reiterated by the Hon'ble Apex Court in judgment titled as **Vice Chancellor, Lucknow University, Lucknow, Uttar Pradesh v. Akhilesh Kumar Khare & another** reported in **2016 (1) SCC 521**. Both the issues are thus decided accordingly.

Issues No. 2 & 4 :

29 In support of these issues no evidence has been led by the respondent. Therefore, in the absence of any specific evidence on record, these issues are decided against the respondent.

Issue No. 5 :

30. There is nothing on record which may show as to why this petition is not maintainable. Since, pursuance to the reference made to this Court, the petitioner had filed the statement of claim, the same is held to be maintainable because this court is required to answer the reference. Even from the reply, which has been filed by the respondent, it is not revealed as to how the petitioner is estopped from filing this petition. Thus, this issue is decided in favour of the petitioner and against the respondent.

Relief :

31. For the foregoing reasons discussed hereinabove supra, the respondent is directed to pay an amount of ` 50,000/- (Fifty Thousand only) to the petitioner as lump sum compensation in lieu of his termination. The amount shall be paid within sixty days from the announcement of award failing which the respondent shall pay interest @ 9% per annum till the realization of the amount. Let a copy of this award be communicated to the appropriate government for publication in the official gazette. File, after completion, be consigned to records.

32. The reference is answered in the aforesaid terms. Ordered accordingly.

Announced in the open Court today this 1st day of November 2021.

Sd/-
(RAJESH TOMAR),
Presiding Judge,
Industrial Tribunal-cum-Labour Court, Shimla.

**IN THE COURT OF SHRI RAJESH TOMAR, PRESIDING JUDGE H.P. INDUSTRIAL
TRIBUNAL-CUM-LABOUR COURT, SHIMLA**

Reference Number : 191 of 2018

Instituted on : 1-12-2018

Decided on : 1-11-2021

Neem Chand s/o Shri Krishnu Ram, r/o Village Baderna, P.O Wabi Materni, Tehsil Arki
District Solan, H.P. . *Petitioner.*

Versus

The Managing Director, Himachal Pradesh Tourism Development Corporation, Near Ritz,
Shimla H.P. . *Respondent.*

Reference under Section 10 of the Industrial Disputes Act, 1947

For the Petitioner : Shri R.K Khidtta, Advocate

For the Respondent : Shri Kartik Kumar, Advocate

AWARD

The following reference petition has been, received from the Appropriate Government for final adjudication:

“Whether termination of services of Shri Neem Chand s/o Shri Krishnu Ram r/o Village Baderna, P.O. Wabi Materni, Tehsil Arki, District Solan, H.P who had worked as Washer Boy, by the Managing Director, Himachal Pradesh Tourism Development Corporation, Near Ritz, Shimla-1 w.e.f. 17-8-2013 without complying with the provisions of the Industrial Disputes Act, 1947, as alleged by the workman, is legal and justified? If not, what relief including reinstatement, amount of back-wages, past service benefits and compensation the above ex-worker is entitled to from the above employer?”

2. On receipt of the said reference from the Appropriate Government, notices were issued to the concerned parties in pursuance to which the petitioner has filed the statement of claim.

3. The case of the petitioner as it emerges from the statement of claim is that the petitioner was engaged as “Utility worker” in the month of May, 2012 in the transport wing of HPTDC work shop Ghora Chowki for 89 days and worked as such till 16-8-2013 continuously and thereafter his services were illegally terminated and after some time w.e.f. 24-4-2014, the petitioner was re-engaged and worked till 30-9-2018 but he has been shown to be re-engaged through contractor whereas he was engaged by the respondent Corporation as the attendance of the petitioner was verified and signed by the official of the Corporation. The leave was also sanctioned by the official of the Corporation and the petitioner was under the direct supervision and control of the Corporation. It is further averred that the services of the petitioner have been orally terminated by the respondent firstly w.e.f. 17-8-2013 and thereafter w.e.f. 30-9-2018 without following the mandatory provisions of the Industrial Disputes Act, 1947 (hereinafter referred to be as the Act) as no notice or pay in lieu of notice and retrenchment compensation has been paid to the petitioner as

the petitioner is a workman as defined under the Act and he used to work manually with the Corporation. It is further averred that the petitioner worked with utmost honesty and dedication and his work was always appreciated by the official of the respondent Corporation and nothing contrary was ever conveyed to him. The Corporation intentionally used to give fictional breaks to the petitioner which was totally illegal as the work which he had performed was continuous in nature and is still available with the respondent Corporation. It is averred that on 17-8-2013, the petitioner was not allowed to work and his services were orally terminated and on his request to re-engage him on the same post with all benefits, he was re-engaged after seven months but no seniority and continuity was not given to him and ultimately his services were again terminated *w.e.f.* 30-9-2018. After his illegal termination, the petitioner visited the office of the respondent number of time and requested to re-engage him but of no avail and he was forced to file demand notice before the Labour Inspector-*cum*-Conciliation Officer, Shimla in which the respondent was duly served. Since, the petitioner had completed 240 days in a calendar year and his juniors are still working with the respondent and even the respondent Corporation failed to follow the principles of “Last Come First Go” and as such his termination is totally against the mandatory provisions of sections 25-F, 25-G and 25-H of the Act and after the illegal termination of the petitioner, he is unemployed.

4. It is therefore prayed from the side of the petitioner that the impugned termination order dated 17-8-2013 and 30-9-2018 passed by the respondent Corporation may kindly be quashed and set-aside and the respondent may kindly be directed to re-instate the petitioner in service with all service benefits including full back-wages and his services may be ordered to be regularized as he has already completed six years of service with the respondent. It is further prayed that the respondent may also be burdened with the cost of litigation amounting to ` 30,000/- and to pay the damages amounting to ` 50,000/- for the harassment caused to the petitioner and his family members due to their illegal action. It is also prayed that any other order which deem just and proper in the resent facts and circumstances of the case/reference may also be passed in favour of the petitioner and against the respondent and justice be done with the petitioner.

5. On notice, the respondent Corporation appeared and filed reply to the claim petition by asserting preliminary objections regarding guilty of suppression *veri suggestio falsi*, no relationship of employer and employee, maintainability, there exists no industrial dispute, no cause of action, claim is a blatant misuse of the judicial process, estoppel and failed to implead M/s Corporate Care as necessary party.

6. On merits, the petitioner was initially engaged as a seasonal worker as a utility worker as per the agreements dated 4-5-2012 and 21-5-2013, in the transport wing of HPTDC Workshop Ghora Chowki, Shimla. He did not work continuously from May 2012 till August 2013. It is denied that the services of the petitioner were illegally terminated and were re-engaged *w.e.f.* 24-4-2014 to 30-9-2018. It is pertinent to mention that after notification dated 17-12-2013, the respondent never hire any worker at their own and the respondent seek services of the outsourcing agencies for this purpose. It is denied that the respondent initially used to give fictional breaks to the petitioner which was totally illegal as the work performed by the petitioner was continuous in nature and is still available. It is further denied that the petitioner was not allowed to work and his services were terminated without complying with the mandatory provisions of the Act on 17-8-2013. The petitioner has no legal right or authority to file demand notice. It is denied that the petitioner has already completed 240 days each calendar year. It is also denied that the termination of the services of the petitioner is illegal, arbitrary and unjust.

7. In view of submissions made hereinabove, it is prayed that the claim petition is liable to be dismissed.

8. While filing rejoinder, the petitioner controverted the averments made thereto in the reply and reaffirmed and reiterated those in the statement of claim.

9. On elucidating the pleading of parties, the following issues were struck down by my Learned Predecessor for its final determination *vide* Court order dated 3-7-2019 :

1. *Whether the termination of services of the petitioner w.e.f. 17-8-2013 is violative of the provisions of the Industrial Disputes Act, as alleged. If so, its effect thereto?* . . .*OPP.*
2. Whether the petitioner has approached this Court with unclean hands and suppressed material facts from this Court as alleged? If so its effect thereto? . . .*OPR.*
3. Whether the claim is not maintainable as it is stated to be barred by limitation as alleged? If so, its effect thereto? . . .*OPR.*
4. Whether the petition is bad for non-joinder/mis-joinder of necessary parties, as alleged? If so, its effect thereto? . . .*OPR.*
5. Whether the reference is not maintainable and the petitioner is estopped from filing of claim as he was engaged on seasonal basis, as alleged? If so its effect thereto? . . .*OPR.*
6. Relief

10. Henceforth, parties to the dispute were asked to adduce oral as well as documentary evidence in support of their respective claims or issues so framed.

11. Arguments of the Learned Counsel for the petitioner as well as Learned Counsel for respondent were heard and gone through the case record with minute care, caution circumspection.

12. For the reasons to be recorded hereinafter while discussing the aforesaid issues, my findings on the aforesaid issues are as follows:

<i>Issue No. 1 :</i>	<i>Partly Yes</i>
Issue No. 2 :	No
Issue No. 3 :	No
Issue No. 4 :	No
Issue No. 5 :	No
Relief :	Reference is partly allowed per operative part of the Award.

REASONS FOR FINDINGS

Issues No. 1 & 3 :

13. Being interlinked and inter-connected both these issues are taken up together for discussion and decision.

14. At the very inception, there is no denial of the fact that the relationship of the petitioner having been engaged as daily wage/contract worker to supplement its manpower requirement

during season which shall be commenced from the date of agreement and shall automatically terminated after expiring of 89 days. As a matter of fact, the petitioner will perform such unskilled work on casual basis which may be assigned to him in the Transport Wing of the respondent. The contractual work shall be automatically terminated after the completion of 89 days and no formal notice/order will be required to be given by either party for the termination of agreement. It is mint for seasonal and specific period and shall not claim the renewal of his engagement as casual worker. It is further agreed that the extension of the agreement will be at the sole discretion of the respondent Corporation. The petitioner shall be deployed from time to time and obey the orders, instructions or directions issued by the respondent Corporation from time to time. The petitioner will be entitled for payment of ` 120/- only per day. It is also agreed between the parties that the agreement shall be terminated in case the respondent Corporation finds the petitioner to be prima-facie guilty of any insubordination, moral turpitude or other misconduct or breach of any condition of agreement or is otherwise found unsuitable for the job, the respondent reserves its right to terminate the agreement. It is further agreed upon the said agreement that any right to claim for his absorption in the Corporation against regular vacancy that may exists or arise in the future. It is not in dispute that no written order was passed while terminating the services of the petitioner as the claim of the respondent remains that it had not retrenched the petitioner from service who had abandoned the job of his own and used to work intermittently as per his own wish and convenience. Admittedly, the reference of the Appropriate Government does not at all relates to plea of fictional breaks but only with regard to petitioner's termination from service. In the backdrop of the said events of foregoing admitted facts on record, the claim of petitioner requires to be adjudicated with a view to determine if petitioner is entitled for relief of reinstatement and back wages along-with seniority and past service benefits and compensation as claimed by him.

15. The petitioner while stepping into witness box as PW-1, tendered in evidence his sworn in affidavit (PW-1/A), reiterating and affirming his pleadings as stipulated in the petition. In his attested affidavit, the petitioner has claimed that he worked as "Utility Worker/Washer Boy" since May 2012 till 16-8-2013. His services were orally terminated *w.e.f.* 17-8-2013 without complying with the mandatory provisions of the Act as no notice or pay lieu of notice or retrenchment compensation has been paid to him. He has also stated that he has worked with utmost honesty and dedication. He was not allowed to work since 17-8-2013 despite repeated requests. He filed demand notice before the Conciliation Officer against his illegal termination. The termination of the services by the respondent is totally illegal as the respondent has not followed the mandatory provisions of the Act. He has completed 240 days in each calendar year, hence, the termination of his services is illegal, unjust, arbitrary and against the mandatory provisions of the Act. He therefore, entitled for the benefits of reinstatement of service with full back-wages and all other consequential service benefits. The petitioner has further allege, on oath, that the respondent Corporation after terminating his services in the year 2013 had engaged several other workers who are junior to him and retained in service. Not only those persons who are junior to him, the respondent had engaged new person namely Surender Kumar. The respondent had not followed the mandatory provisions of sections 25-F, 25-G and 25-H of the Act which were obligatory on its part. No notice was served upon him. The petitioner had moved before the Labour-cum-Conciliation Officer and raised demand notice, consequent upon which the Labour Commissioner make reference for industrial dispute raised by the petitioner. He has been subjected to mental harassment and financial loss to which the respondent is liable to pay damages to the Tune of ` five lakhs along-with litigation costs.

16. In cross-examination, the petitioner denied that he had worked for 89 days only *i.e.* *w.e.f.* 4-5-2012 to 17-8-2013. He further denied that he was called for seasonal work as and when work was available with the respondent. He also denied that after 2013 the respondent used to engage workers through contractors. He denied that he had not completed 240 days in any calendar year. However, the petitioner admitted that the agreements Mark R-1 and Mark R-2 bears his signatures.

17. Another witness examined on behalf of the petitioner is Man Singh (PW-2), Senior Assistant, of Respondent Corporation who has testified that the petitioner was initially appointed on 4-5-2012 and worked till 17-8-2013 as per the mandays chart (PW-2/A). The bill and vouchers are not produced due to unavailability. One Surender Kumar has been re-engaged by the Corporation in the year 2017 through normal appointment process who is still working with the respondent as Utility worker.

18. On the other hand, the respondent Corporation examined one Shri Man Singh, Senior Assistant (RW-1) who has tendered in evidence his affidavit (RW-1/A). He also tendered in evidence authority letter (RW-1/B), copies of agreements dated 4-5-2012 and 21-5-2013 (RW-1/C & RW-1/D) and copy of notification (RW-1/E).

19. In cross-examination he admitted that the petitioner was engaged as utility worker with the respondent corporation since May 2012. He further admitted that the services of the petitioner were terminated on 17-8-2013. He also admitted that no notice or compensation was paid to the petitioner before terminating his services and that no enquiry was conducted prior to his termination. He admitted that after 24-4-2014, the services of the petitioner have been shown to be engaged on out-source basis through contractor and no notice under section 9-A of the Act was issued to him before changing his service conditions. He admitted that as per the reply dated 30-10-2017 (PX), Surender Kumar was engaged as utility worker as mentioned in para 3 of the reply. He admitted that the work of utility is being dispensed with in the respondent Corporation since 2012. He admitted that as per reply the Corporation maintains the attendance and leave record and that the petitioner was working under the supervision and direction of the respondent. However, this witness denies that the petitioner worked till 16-8-2013 continuously. He further denied that the petitioner has completed 240 working days continuously prior to his termination on 17-8-2013 and also in preceding twelve months. He denied that notification (RW-1/E) was issued to those workers who have been engaged after the year 2013 and that the notification (RW-1/E) was not applicable to the workers working prior to 2013. He denied that the petitioner was engaged by the respondent on 24-4-2014 and terminated on 30-9-2018 without serving any notice or compensation. This witness also denied that the Corporation used to give fictional breaks to the petitioner intentionally so that he could not complete 240 days in a calendar year. He expressed his ignorance that the services of Dinesh Thakur, Santosh Devi and Yashwant Singh junior to the petitioner were regularized by the Corporation.

20. It is pertinent to mention here that the plea of abandonment raised by the respondent is concerned, the same merits rejection in view of the fact that respondent had failed to produce any record by which it could be established that whenever petitioner absented from his duty as also reflected in mandays chart (PW-2/A) no notice was ever issued to him. As such, in absence of any specific and reliable evidence led by respondent, it would be unsafe to hold that respondent had established plea of abandonment.

21. Verily, an overall assessment, analysis and synthesis of the mandays chart (PW-2/A) would reveal that petitioner had worked for 28 days in the month of May 2012, 30 days in the month of June 2012, 31 days in the month of July 2012 total 89 days in the year 2012, and 11 days in the month of May 2013, 30 days in the month of June 2013, 31 days in the month of July 2013 and 17 days in the month of August 2013 in total the petitioner had worked for 89 days in the year 2012 and 11 days in the month of May 2013, 30 days in the month of June 2013, 31 days in the month of July 2013 and 17 days in the month of August 2013 in total the petitioner had worked for 89 days in the year 2012 and 11 days in the month of May 2013. Be it noticed that except the years 2012 and 2013, the petitioner had worked for more than 160 days and as there is no reference from the Labour Commissioner, Shimla on the point of artificial breaks, this Court is to confine its findings only with regard to alleged illegal termination. It is evident from mandays chart (PW-2/A) that in the year 2012 the petitioner had merely worked for 178 days and thus immediately in preceding 12 calendar months from the month

of termination of petitioner had not rendered service of 240 days so as to meet requirement of law of having continuous service of one year and thus it was not at all required from respondent to have issued a notice envisaged under Section 25-F of the Act. As such, the respondent is held to have not violated the provisions of Section 25-F of the Act.

22. Ld. Counsel for petitioner has contended with vehemence that large number of workers who were junior to petitioner had been appointed and these workers have been retained in service and regularized. The grievance of petitioner remains that principle of 'Last come First go' was not followed as the juniors were retained and services of petitioner despite being senior was terminated without any valid reason. Evidently, there is no iota of evidence of respondent establishing that petitioner was called upon to join for service at any time after May, 2004 even at the time when junior persons were reengaged. That being so the respondent had certainly violated the provisions of Section 25-G of the Act. Ld. Authorized Representative for petitioner has placed reliance upon judgment of **Central Bank of India vs. S. Satyam, 1996 (5) SCC 418** in which Hon'ble Apex Court has held that for the applicability of Section 25-G and 25-H of the Act, there was no necessity of claimant/petitioner to have worked for 240 days as in case of provisions of Section 25-F of the Act.

23. Per contra, repudiating claim of petitioner, the respondent, on the other hand, has made futile attempt to justify engagement of junior workers as stated above that petitioner remained out of job after his termination but there is nothing authenticated in evidence suggesting that he remained without earning and petitioner as (PW1) has nowhere stated that he had opted out for job when terminated from service. As such, it is held that after his termination he was not in government job and cross-examination of (PW1) reveals that he had not been paid retrenchment compensation and notice at the time of retrenchment. Since the respondent had failed to prove on record any seniority list by which it would be stated that persons who were junior to petitioner were retained in service whereas petitioner who was senior and thus respondent had clearly violated Section 25-G of Industrial Disputes Act. In view of ratio of judgment of Hon'ble Apex Court reported in **2015 (4) SCC 544** titled as **Mackinnon Mackenzie & Company Ltd. vs. Mackinnon Employees Union** which mandatorily requires the employer to circulate seniority list as prepared. There is no iota of evidence on record remotely suggesting that respondent had provided seniority list of daily waged workers. As such, plea of petitioner that he was ignored and new hands were allowed to join is to be accepted. In view of foregoing discussions, respondent is held to have violated the provisions of Section 25-G and 25-H of the Industrial Disputes Act. As such, even when petitioner is proved to have not worked for more than 160 days in preceding four years which entitled him for regularization of his service per government policy, yet respondent is not absolved from its accountability of provisions of Section 25-G and 25-H of the Act and as such it is held that respondent had violated the provisions of Sections 25-G and 25-H of the Industrial Disputes Act.

24. Since, the termination of the petitioner having been held to be in violation of the provisions of sections 25-G and 25-H of the Act, the next question which thus gains significance is as to what relief the petitioner is entitled to.

25. Recent trends, more particularly much after the year 2007 shows that grant of compensation in lieu of reinstatement has gained precedence, more particularly, where the services of the workmen have been terminated because of procedural defects. In the case in hand too the termination is found to be illegal in view of the provisions of sections 25-G and 25-H of the Act, the interest of justice would thus be met, in case the petitioner is granted compensation in lieu of reinstatement thereof. In this behalf support can ably be drawn from the judgment of the Hon'ble Supreme Court titled as **Bharat Sanchar Nigam Ltd. Vs. Bhurumal (2014) 7 SCC 177** and further reiterated lately in **P. Karupaiyah (dead) through Legal Representatives Vs. General Manager, Thruvulluvar Transport Corporation Ltd. (2018) 12 SCC 663** and **Rashtrasant Tukdoji Maharaj Technical Education Samnsta, Nagpur Vs. Prashant Manikrao Kubitkar (2018) 12 SCC 294**.

26. Furthermore, Ld. Counsel representing respondent Corporation has also contended with vehemence that claim petition is barred by limitation as the same has been filed beyond the period of limitation without assigning any reasonable cause. It has been pointed that termination of petitioner in this case took place on 2012 and the industrial dispute was raised after several years of retrenchment. Repudiating the argument by Learned Counsel for respondent, Ld. counsel for the petitioner has placed reliance upon judgment reported in **2007 LHLJ 903 Hon'ble High Court of H.P. Bhatag Ram's case** in which it has been held that delay in raising dispute may be considered by court at the time of granting final relief however in various other judgments even longer delay has been condoned. **In Divisional Manager, HPFC & another vs. Garibu Ram, Latest HLJ 2007 (HP) 1160**, delay of more than 10 years was condoned besides Hon'ble High Court has held that principle of Limitation Act is not applicable to the industrial dispute. Similar view was taken by Hon'ble Apex Court in **Ajayab Singh vs. Sirhind Co-operative Marketing-cum-Processing Society Limited and Another (1999) 6 SCC 82** in which it has been held that the principle of Limitation Act, 1963 did not apply to the proceeding under the Industrial Disputes Act.

27. On elucidation of the above mentioned judgments, it has been contended that claim of petitioner cannot be defeated on the point of delay and laches. Repudiating arguments advanced by Ld. Counsel for the petitioner, Learned Counsel for respondent, has placed reliance upon the judgment of Hon'ble Apex Court titled as **Assistant Engineer, Rajasthan State Agriculture Marketing Board, Sub-Division Kota and Mohan Lal 2013 (9) SCR 91**, the relevant para of the judgment are produced below for reference:

21. Now, if the facts of the present case are seen, the position that emerges is this: the workman worked as a work-charged employee for a period from 1-11-1984 to 17-2-1986 (in all he worked for 286 days during his employment). The services of the workman were terminated with effect from 18-2-1986. The workman raised the industrial dispute in 1992, i.e. after 6 years of termination. The Labour Court did not keep in view admitted delay of 6 years in raising the industrial dispute by the workman. The judicial discretion exercised by the Labour Court is, thus, flawed and unsustainable. The Division Bench of the High Court was clearly in error in restoring the award of the Labour Court whereby reinstatement was granted to the workman. Though, the compensation awarded by the Single Judge was too low and needed to be enhanced by the Division Bench but surely reinstatement of the workman in the facts and circumstances is not the appropriate relief.

22. In our opinion, interest of justice will be subserved if in lieu of reinstatement, the compensation of Rs.1,00,000/- (one lac) is paid by the appellant (employer) to the respondent (workman). We order accordingly. Such payment shall be made by the appellant to the respondent within six weeks from today failing which the same will carry interest @ 9% per annum....."

28. Thus, from a careful examination of the entire pleadings and evidence of the case leading to the peculiar facts, circumstances and evidence vis-à-vis having gone through the rival contention of the Learned counsel for the parties, keeping in view the mandate of Hon'ble Apex Court in various judgments referred to above, it is held that delay in raising industrial dispute is definitely an important circumstance and court has to keep in mind while exercising discretion. In para nos. 21 and 22 of judgment 2013 supra has referred to Gitam Singh's case reported in **2013 (5) SCC 136 titled as Assistant Engineer Rajasthan Development Corporation and another vs. Geetam Singh** observing that before exercising its judicial discretion, the Labour Court has to keep in view all relevant factors including the mode and manner of appointment, nature of employment, length of service, the ground on which termination has been set aside and the delay in raising industrial dispute before grant of relief in an industrial dispute. It was observed by the Hon'ble

Apex Court in judgment (2013 supra) before that workman had worked for 286 days and had raised industrial dispute in 1992 whereas his services have been terminated in 1986 and he raised industrial dispute after six years. The Hon'ble Apex Court has held that though compensation awarded by Single Judge of the Hon'ble High Court was too low and liable to be enhanced by the Division Bench but surely reinstatement of the workman in the facts and circumstances is not the appropriate relief and thus Hon'ble Apex Court awarded a lump-sum of Rs. one lakh along-with interest @ 9% per annum if the respondent failed to make payment of compensation within six weeks from the date of judgment. In the case in hand before this court factors which have weighed are that the petitioner in all remained worked for 178 as per mandays chart (PW-2/A) on record and that the services of petitioner were disengaged in August 2013, who worked as utility worker and had raised industrial dispute by issuance of demand notice after about 4 years. It is also pertinent to mention here that petitioner on the date of filing claim petition was ageing 32 years who has sufficient spell of life to work and earn his livelihood. Taking into consideration factors mentioned above in pursuance to judgments of Hon'ble Apex Court petitioner would not be entitled either for reinstatement or for back wages but compensation a lump-sum would be appropriate relief in view of judgment **2013 (9) SCR 91**. The judgments relied upon by Id. counsel for the petitioner on the matter of delay and laches is more or less settled law that claim of the petitioner could not be solely declined on the ground of delay and laches. Similarly, judgment of Hon'ble Apex Court in 2014 titled as Raghbir Singh's case also does not come to the rescue of the petitioner as in this judgment also the Hon'ble Apex Court has reiterated the mandate as given by the Hon'ble Apex Court in previous judgment in the year 2013 *i.e.* Assistant Engineer, Rajasthan State Agriculture Marketing Board, Sub-Division Kota and Mohan Lal's case. Similar view was reiterated by the Hon'ble Apex Court in judgment titled as **Vice Chancellor, Lucknow University Lucknow, Uttar Pradesh v. Akhilesh Kumar Khare & another** reported in **2016 (1) SCC 521**. Both the issues are thus decided accordingly.

Issues No. 2 & 4 :

29. In support of these issues no evidence has been led by the respondent. Therefore, in the absence of any specific evidence on record, these issues are decided against the respondent.

Issue No. 5 :

30. There is nothing on record which may show as to why this petition is not maintainable. Since, pursuance to the reference made to this Court, the petitioner had filed the statement of claim, the same is held to be maintainable because this court is required to answer the reference. Even from the reply, which has been filed by the respondent, it is not revealed as to how the petitioner is estopped from filing this petition. Thus, this issue is decided in favour of the petitioner and against the respondent.

Relief :

31. For the foregoing reasons discussed hereinabove supra, the respondent is directed to pay an amount of ` 50,000/- (Fifty Thousand only) to the petitioner as lump sum compensation in lieu of his termination. The amount shall be paid within sixty days from the announcement of award failing which the respondent shall pay interest @ 9% per annum till the realization of the amount. Let a copy of this award be communicated to the appropriate government for publication in the official gazette. File, after completion, be consigned to records.

The reference is answered in the aforesaid terms. Ordered accordingly.

Announced in the open Court today this 1st day of November 2021.

Sd/-
(RAJESH TOMAR),
Presiding Judge,
Industrial Tribunal-cum-Labour Court, Shimla.

**IN THE COURT OF SHRI RAJESH TOMAR PRESIDING JUDGE H.P. INDUSTRIAL
TRIBUNAL-CUM-LABOUR COURT, SHIMLA**

Reference Number : 193 of 2018

Instituted on : 1-12-2018

Decided on : 1-11-2021

Surender Kumar S/o Shri Satish Kumar, r/o Village Dhtali, P.O. Khundla, Tehsil Sarkaghat District Mandi, H.P. . *Petitioner.*

Versus

The Managing Director, Himachal Pradesh Tourism Development Corporation, Near Ritz, Shimla H.P. . *Respondent.*

Reference under Section 10 of the Industrial Disputes Act, 1947

For the Petitioner: Shri R.K Khidtta, Advocate.

For the Respondent: Shri Kartik Kumar, Advocate.

AWARD

The following reference petition has been, received from the Appropriate Government for final adjudication:

“Whether termination of services of Shri Surender Kumar s/o Shri Satish Kumar r/o Village Dhtali, P.O Khundla, Tehsil Sarkaghat, District Mandi, H.P. who had worked as Washer Boy, by the Managing Director, Himachal Pradesh Tourism Development Corporation, Near Ritz Shimla-1 during April, 2013 without complying with the provisions of the Industrial Disputes Act, 1947, as alleged by the workman, is legal and justified? If not, what relief including reinstatement, amount of back-wages, past service benefits and compensation the above ex-worker is entitled to from the above employer?”

2. On receipt of the said reference from the Appropriate Government, notices were issued to the concerned parties in pursuance to which the petitioner has filed the statement of claim.

3. The case of the petitioner as it emerges from the statement of claim is that the petitioner was engaged as “Utility worker” on 10-5-2011 in the transport wing of HPTDC work shop Ghora Chowki for 89 days and worked as such till 16-11-2013 continuously and thereafter his services were illegally terminated and after some time *w.e.f.* 24-4-2014, the petitioner was re-engaged and worked till 30-9-2018 but he has been shown to be re-engaged through contractor whereas he was engaged by the respondent Corporation as the attendance of the petitioner was verified and signed by the official of the Corporation. The leave was also sanctioned by the official of the Corporation and the petitioner was under the direct supervision and control of the Corporation. It is further averred that the services of the petitioner have been orally terminated by the respondent firstly *w.e.f.* 17-8-2013 and thereafter *w.e.f.* 30-9-2018 without following the mandatory provisions of the Industrial Disputes Act, 1947 (hereinafter referred to be as the Act) as no notice or pay in lieu of notice and retrenchment compensation has been paid to the petitioner as

the petitioner is a workman as defined under the Act and he used to work manually with the Corporation. It is further averred that the petitioner worked with utmost honesty and dedication and his work was always appreciated by the official of the respondent Corporation and nothing contrary was ever conveyed to him. The Corporation intentionally used to give fictional breaks to the petitioner which was totally illegal as the work which he had performed was continuous in nature and is still available with the respondent Corporation. It is averred that on 17-8-2013, the petitioner was not allowed to work and his services were orally terminated and on his request to re-engage him on the same post with all benefits, he was re-engaged after seven months but no seniority and continuity was not given to him and ultimately his services were again terminated *w.e.f.* 30-9-2018. After his illegal termination, the petitioner visited the office of the respondent number of time and requested to re-engage him but of no avail and he was forced to file demand notice before the Labour Inspector-*cum*-Conciliation Officer, Shimla in which the respondent was duly served. Since, the petitioner had completed 240 days in a calendar year and his juniors are still working with the respondent and even the respondent Corporation failed to follow the principles of “Last Come First Go” and as such his termination is totally against the mandatory provisions of sections 25-F, 25-G and 25-H of the Act and after the illegal termination of the petitioner, he is unemployed.

4. It is therefore prayed from the side of the petitioner that the impugned termination order dated 17-8-2013 and 30-9-2018 passed by the respondent Corporation may kindly be quashed and set-aside and the respondent may kindly be directed to re-instate the petitioner in service with all service benefits including full back-wages and his services may be ordered to be regularized as he has already completed six years of service with the respondent. It is further prayed that the respondent may also be burdened with the cost of litigation amounting to ` 30,000/- and to pay the damages amounting to ` 50,000/- for the harassment caused to the petitioner and his family members due to their illegal action. It is also prayed that any other order which deem just and proper in the resent facts and circumstances of the case/reference may also be passed in favour of the petitioner and against the respondent and justice be done with the petitioner.

5. On notice, the respondent Corporation appeared and filed reply to the claim petition by asserting preliminary objections regarding guilty of suppression veri suggestio falsi, no relationship of employer and employee, maintainability, there exists no industrial dispute, no cause of action, claim is a blatant misuse of the judicial process, estoppel and failed to implead M/s Corporate Care as necessary party.

6. On merits, the petitioner was initially engaged as a seasonal worker as a utility worker as per the agreements dated 10-5-2011, 5-10-2011, 17-9-2012 and 1-4-2013, in the transport wing of HPTDC Workshop Ghora Chowki, Shimla. He did not work continuously from May 2012 till April 2013. It is denied that the services of the petitioner were illegally terminated and were re-engaged *w.e.f.* 24-4-2014 to 30-9-2018. It is pertinent to mention that after notification dated 17-12-2013, the respondent never hire any worker at their own and the respondent seek services of the outsourcing agencies for this purpose. It is denied that the respondent initially used to give fictional breaks to the petitioner which was totally illegal as the work performed by the petitioner was continuous in nature and is still available. It is further denied that the petitioner was not allowed to work and his services were terminated without complying with the mandatory provisions of the Act on 17-8-2013. The petitioner has no legal right or authority to file demand notice. It is denied that the petitioner has already completed 240 days each calendar year. It is also denied that the termination of the services of the petitioner is illegal, arbitrary and unjust.

7. In view of submissions made hereinabove, it is prayed that the claim petition is liable to be dismissed.

8. While filing rejoinder, the petitioner controverted the averments made thereto in the reply and reaffirmed and reiterated those in the statement of claim.

9. On elucidating the pleading of parties, the following issues were struck down by my Learned Predecessor for its final determination *vide* Court order dated 3-7-2019 :

1. *Whether the termination of services of the petitioner w.e.f. 16-11-2013 is violative of the provisions of the Industrial Disputes Act, as alleged. If so, its effect thereto? . . .OPP.*
2. Whether the petitioner has approached this Court with unclean hands and suppressed material facts from this Court as alleged? If so its effect thereto? . . .*OPR.*
3. Whether the claim is not maintainable as it is stated to be barred by limitation as alleged? If so, its effect thereto? . . .*OPR.*
4. Whether the petition is bad for non-joinder/mis-joinder of necessary parties, as alleged? If so, its effect thereto? . . .*OPR.*
5. Whether the reference is not maintainable and the petitioner is estopped from filing of claim as he was engaged on seasonal basis, as alleged? If so its effect thereto? . . .*OPR.*
6. Relief

10. Henceforth, parties to the dispute were asked to adduce oral as well as documentary evidence in support of their respective claims or issues so framed.

11. Arguments of the Learned Counsel for the petitioner as well as Learned Counsel for respondent were heard and gone through the case record with minute care, caution circumspection.

12. For the reasons to be recorded hereinafter while discussing the aforesaid issues, my findings on the aforesaid issues are as follows:

Issue No. 1 :	Partly Yes
Issue No. 2 :	No
Issue No. 3 :	No
Issue No. 4 :	No
Issue No. 5 :	No
Relief :	Reference is partly allowed per operative part of the Award

REASONS FOR FINDINGS

Issues No.1 & 3:

13. Being interlinked and inter-connected both these issues are taken up together for discussion and decision.

14. At the very inception, there is no denial of the fact that the relationship of the petitioner having been engaged as daily wage/contract worker to supplement its manpower requirement during season which shall be commenced from the date of agreement and shall automatically terminated after expiring of 89 days. As a matter of fact, the petitioner will perform such unskilled

work on casual basis which may be assigned to him in the Transport Wing of the respondent. The contractual work shall be automatically terminated after the completion of 89 days and no formal notice/order will be required to be given by either party for the termination of agreement. It is mint for seasonal and specific period and shall not claim the renewal of his engagement as casual worker. It is further agreed that the extension of the agreement will be at the sole discretion of the respondent Corporation. The petitioner shall be deployed from time to time and obey the orders, instructions or directions issued by the respondent Corporation from time to time. The petitioner will be entitled for payment of ` 120/- only per day. It is also agreed between the parties that the agreement shall be terminated in case the respondent Corporation finds the petitioner to be prima-facie guilty of any insubordination, moral turpitude or other misconduct or breach of any condition of agreement or is otherwise found unsuitable for the job, the respondent reserves its right to terminate the agreement. It is further agreed upon the said agreement that any right to claim for his absorption in the Corporation against regular vacancy that may exists or arise in the future. It is not in dispute that no written order was passed while terminating the services of the petitioner as the claim of the respondent remains that it had not retrenched the petitioner from service who had abandoned the job of his own and used to work intermittently as per his own wish and convenience. Admittedly, the reference of the Appropriate Government does not at all relates to plea of fictional breaks but only with regard to petitioner's termination from service. In the backdrop of the said events of foregoing admitted facts on record, the claim of petitioner requires to be adjudicated with a view to determine if petitioner is entitled for relief of reinstatement and back wages along-with seniority and past service benefits and compensation as claimed by him.

15. The petitioner while stepping into witness box as PW-1, tendered in evidence his sworn in affidavit (PW-1/A), reiterating and affirming his pleadings as stipulated in the petition. In his attested affidavit, the petitioner has claimed that he worked as "Utility Worker/Washer Boy" *w.e.f.* 10-5-2011 till 16-11-2013. His services were orally terminated *w.e.f.* 17-11-2013 without complying with the mandatory provisions of the Act as no notice or pay lieu of notice or retrenchment compensation has been paid to him. He has also stated that he has worked with utmost honesty and dedication. He was not allowed to work since 17-11-2013 despite repeated requests. He filed demand notice before the Conciliation Officer against his illegal termination. The termination of the services by the respondent is totally illegal as the respondent has not followed the mandatory provisions of the Act. He has completed 240 days in each calendar year, hence, the termination of his services is illegal, unjust, arbitrary and against the mandatory provisions of the Act. He therefore, entitled for the benefits of reinstatement of service with full back-wages and all other consequential service benefits. The petitioner has further allege, on oath, that the respondent Corporation after terminating his services in the year 2013 had engaged several other workers who are junior to him and retained in service. Not only those persons who are junior to him, the respondent had engaged new person namely Surender Kumar. The respondent had not followed the mandatory provisions of sections 25-F, 25-G and 25-H of the Act which were obligatory on its part. No notice was served upon him. The petitioner had moved before the Labour-*cum*-Conciliation Officer and raised demand notice, consequent upon which the Labour Commissioner make reference for industrial dispute raised by the petitioner. He has been subjected to mental harassment and financial loss to which the respondent is liable to pay damages to the Tune of ` five lakhs along-with litigation costs.

16. In cross-examination, the petitioner denied that he had worked for 89 days only *i.e.* *w.e.f.* 10-5-2011 to 17-8-2013. He further denied that he was called for seasonal work as and when work was available with the respondent. He also denied that after 2013 the respondent used to engage workers through contractors. He denied that he had not completed 240 days in any calendar year.

17. Another witness examined on behalf of the petitioner is Man Singh (PW-2), Senior Assistant, of Respondent Corporation who has testified that the petitioner was initially appointed on

4-5-2012 and worked till 17-8-2013 as per the mandays chart (PW-2/A). The bill and vouchers are not produced due to unavailability. One Surender Kumar has been re-engaged by the Corporation in the year 2017 through normal appointment process who is still working with the respondent as Utility worker.

18. On the other hand, the respondent Corporation examined one Shri Man Singh, Senior Assistant (RW-1) who has tendered in evidence his affidavit (RW-1/A). He also tendered in evidence authority letter (RW-1/B), copies of agreements dated 17-9-2012, 26-12-2012, 20-4-2012, 5-10-2011, 10-5-2011, 14/2013, 18-9-2013 (RW-1/C to RW-1/J) and copy of notification (RW-1/K).

19. In cross-examination he admitted that the petitioner was engaged as utility worker with the respondent corporation since 10-5-2011. He further admitted that the services of the petitioner were terminated on 17-11-2013. He also admitted that no notice or compensation was paid to the petitioner before terminating his services and that no enquiry was conducted prior to his termination. He admitted that after 24-4-2014, the services of the petitioner have been shown to be engaged on out-source basis through contractor and no notice under section 9-A of the Act was issued to him before changing his service conditions. He admitted that as per the reply dated 30-10-2017 (PX), Surender Kumar was engaged as utility worker as mentioned in para 3 of the reply. He admitted that the work of utility is being dispensed with in the respondent Corporation since 2012. He admitted that as per reply the Corporation maintains the attendance and leave record and that the petitioner was working under the supervision and direction of the respondent. However, this witness denies that the petitioner worked till 16-8-2013 continuously. He further denied that the petitioner has completed 240 working days continuously prior to his termination on 17-8-2013 and also in preceding twelve months. He denied that notification (RW-1/E) was issued to those workers who have been engaged after the year 2013 and that the notification (RW-1/E) was not applicable to the workers working prior to 2013. He denied that the petitioner was engaged by the respondent on 24-4-2014 and terminated on 30-9-2018 without serving any notice or compensation. This witness also denied that the Corporation used to give fictional breaks to the petitioner intentionally so that he could not complete 240 days in a calendar year. He expressed his ignorance that the services of Dinesh Thakur, Santosh Devi and Yashwant Singh junior to the petitioner were regularized by the Corporation.

20. It is pertinent to mention here that the plea of abandonment raised by the respondent is concerned, the same merits rejection in view of the fact that respondent had failed to produce any record by which it could be established that whenever petitioner absented from his duty as also reflected in mandays chart (PW-2/A) no notice was ever issued to him. As such, in absence of any specific and reliable evidence led by respondent, it would be unsafe to hold that respondent had established plea of abandonment.

21. Verily, an overall assessment, analysis and synthesis of the mandays chart (PW-2/A) would reveal that petitioner had worked for 177 days in the year 2011, 157 days in the year 2012 and 232 days in the year 2013. Thus it is clear that the petitioner had worked for 177 days in the year 2011, 157 days in the year 2012 and 232 days in the year 2013 and as there is no reference from the Labour Commissioner, Shimla on the point of artificial breaks, this Court is to confine its findings only with regard to alleged illegal termination. It is evident from mandays chart (PW-2/A) that in the year 2013 the petitioner had merely worked for 232 days and thus immediately in preceding 12 calendar months from the month of termination of petitioner had not rendered service of 240 days so as to meet requirement of law of having continuous service of one year and thus it was not at all required from respondent to have issued a notice envisaged under Section 25-F of the Act. As such, the respondent is held to have not violated the provisions of Section 25-F of the Act.

22. Ld. Counsel for petitioner has contended with vehemence that large number of workers who were junior to petitioner had been appointed and these workers have been retained in service

and regularized. The grievance of petitioner remains that principle of 'Last come First go' was not followed as the juniors were retained and services of petitioner despite being senior was terminated without any valid reason. Evidently, there is no iota of evidence of respondent establishing that petitioner was called upon to join for service at any time after May, 2004 even at the time when junior persons were reengaged. That being so the respondent had certainly violated the provisions of Section 25-G of the Act. Authorized Representative for petitioner has placed reliance upon judgment of **Central Bank of India vs. S. Satyam, 1996 (5) SCC 418** in which Hon'ble Apex Court has held that for the applicability of Section 25-G and 25-H of the Act, there was no necessity of claimant/petitioner to have worked for 240 days as in case of provisions of Section 25-F of the Act.

23. Per contra, repudiating claim of petitioner, the respondent, on the other hand, has made futile attempt to justify engagement of junior workers. As stated above that petitioner remained out of job after his termination but there is nothing authenticated in evidence suggesting that he remained without earning and petitioner as (PW1) has nowhere stated that he had opted out for job when terminated from service. As such, it is held that after his termination he was not in government job and cross-examination of (PW1) reveals that he had not been paid retrenchment compensation and notice at the time of retrenchment. Since the respondent had failed to prove on record any seniority list by which it would be stated that persons who were junior to petitioner were retained in service whereas petitioner who was senior and thus respondent had clearly violated Section 25-G of Industrial Disputes Act. In view of ratio of judgment of Hon'ble Apex Court reported in **2015 (4) SCC 544** titled as **Mackinnon Mackenzie & Company Ltd. vs. Mackinnon Employees Union** which mandatorily requires the employer to circulate seniority list as prepared. There is no iota of evidence on record remotely suggesting that respondent had provided seniority list of daily waged workers. As such, plea of petitioner that he was ignored and new hands were allowed to join is to be accepted. In view of foregoing discussions, respondent is held to have violated the provisions of Section 25-G and 25-H of the Industrial Disputes Act. As such, even when petitioner is proved to have not worked for more than 160 days in preceding four years which entitled him for regularization of his service per government policy, yet respondent is not absolved from its accountability of provisions of Section 25-G and 25-H of the Act and as such it is held that respondent had violated the provisions of Sections 25-G and 25-H of the Industrial Disputes Act.

24. Since, the termination of the petitioner having been held to be in violation of the provisions of sections 25-G and 25-H of the Act, the next question which thus gains significance is as to what relief the petitioner is entitled to.

25. Recent trends, more particularly much after the year 2007 shows that grant of compensation in lieu of reinstatement has gained precedence, more particularly, where the services of the workmen have been terminated because of procedural defects. In the case in hand too the termination is found to be illegal in view of the provisions of sections 25-G and 25-H of the Act, the interest of justice would thus be met, in case the petitioner is granted compensation in lieu of reinstatement thereof. In this behalf support can ably be drawn from the judgment of the Hon'ble Supreme Court titled as **Bharat Sanchar Nigam Ltd. Vs. Bhurumal (2014) 7 SCC 177** and further reiterated lately in **P. Karupiah (dead) through Legal Representatives Vs. General Manager, Thruvavalluvar Transport Corporation Ltd. (2018) 12 SCC 663** and **Rashtrasant Tukdoji Maharaj Technical Education Samnatha, Nagpur Vs. Prashant Manikrao Kubitkar (2018) 12 SCC 294**.

26. Furthermore, Ld. Counsel representing respondent Corporation has also contended with vehemence that claim petition is barred by limitation as the same has been filed beyond the period of limitation without assigning any reasonable cause. It has been pointed that termination of petitioner in this case took place on 2012 and the industrial dispute was raised after several years of retrenchment. Repudiating the argument by Learned Counsel for respondent, Ld. counsel for the

petitioner has placed reliance upon judgment reported in 2007 LHLJ 903 Hon'ble High Court of H.P. Bhatag Ram's case in which it has been held that delay in raising dispute may be considered by court at the time of granting final relief however in various other judgments even longer delay has been condoned. In Divisional Manager, HPFC & another vs. Garibu Ram, Latest HLJ 2007 (HP) 1160, delay of more than 10 years was condoned besides Hon'ble High Court has held that principle of Limitation Act is not applicable to the industrial dispute. Similar view was taken by Hon'ble Apex Court in Ajavab Singh vs. Sirhind Co-operative Marketing-cum-Processing Society Limited and Another, (1999) 6 SCC 82 in which it has been held that the principle of Limitation Act, 1963 did not apply to the proceeding under the Industrial Disputes Act.

27. On elucidation of the above mentioned judgments, it has been contended that claim of petitioner cannot be defeated on the point of delay and laches. Repudiating arguments advanced by Ld. Counsel for the petitioner, Learned Counsel for respondent, has placed reliance upon the judgment of Hon'ble Apex Court titled as Assistant Engineer, Rajasthan State Agriculture Marketing Board, Sub-Division Kota and Mohan Lal 2013 (9) SCR 91, the relevant para of the judgment are produced below for reference:

21. Now, if the facts of the present case are seen, the position that emerges is this: the workman worked as a work-charged employee for a period from 1-11-1984 to 17-2-1986 (in all he worked for 286 days during his employment). The services of the workman were terminated with effect from 18-2-1986. The workman raised the industrial dispute in 1992, i.e. after 6 years of termination. The Labour Court did not keep in view admitted delay of 6 years in raising the industrial dispute by the workman. The judicial discretion exercised by the Labour Court is, thus, flawed and unsustainable. The Division Bench of the High Court was clearly in error in restoring the award of the Labour Court whereby reinstatement was granted to the workman. Though, the compensation awarded by the Single Judge was too low and needed to be enhanced by the Division Bench but surely reinstatement of the workman in the facts and circumstances is not the appropriate relief.

22. In our opinion, interest of justice will be subserved if in lieu of reinstatement, the compensation of Rs. 1,00,000/- (one lac) is paid by the appellant (employer) to the respondent (workman). We order accordingly. Such payment shall be made by the appellant to the respondent within six weeks from today failing which the same will carry interest @ 9% per annum....."

28. Thus, from a careful examination of the entire pleadings and evidence of the case leading to the peculiar facts, circumstances and evidence vis-à-vis having gone through the rival contention of the Learned counsel for the parties, keeping in view the mandate of Hon'ble Apex Court in various judgments referred to above, it is held that delay in raising industrial dispute is definitely an important circumstance and court has to keep in mind while exercising discretion. In para nos. 21 and 22 of judgment 2013 supra has referred to Gitam Singh's case reported in 2013 (5) SCC 136 titled as Assistant Engineer Rajasthan Development Corporation and another vs. Geetam Singh observing that before exercising its judicial discretion, the Labour Court has to keep in view all relevant factors including the mode and manner of appointment, nature of employment, length of service, the ground on which termination has been set aside and the delay in raising industrial dispute before grant of relief in an industrial dispute. It was observed by the Hon'ble Apex Court in judgment (2013 supra) before that workman had worked for 286 days and had raised industrial dispute in 1992 whereas his services have been terminated in 1986 and he raised industrial dispute after six years. The Hon'ble Apex Court has held that though compensation awarded by Single Judge of the Hon'ble High Court was too low and liable to be enhanced by the Division Bench but surely reinstatement of the workman in the facts and circumstances is not the appropriate relief and thus Hon'ble Apex Court awarded a lump-sum of Rs. one lakh along-with

interest @ 9% per annum if the respondent failed to make payment of compensation within six weeks from the date of judgment. In the case in hand before this court factors which have weighed are that the petitioner in all remained worked for 177 days in the year 2011, 157 days in the year 2012 and 232 days in the year 2013 as per mandays chart (PW-2/A) on record and that the services of petitioner were disengaged in November 2013, who worked as utility worker and had raised industrial dispute by issuance of demand notice after about 4 years. It is also pertinent to mention here that petitioner on the date of filing claim petition was ageing 34 years who has sufficient spell of life to work and earn his livelihood. Taking into consideration factors mentioned above in pursuance to judgments of Hon'ble Apex Court petitioner would not be entitled either for reinstatement or for back wages but compensation a lump-sum would be appropriate relief in view of judgment **2013 (9) SCR 91**. The judgments relied upon by ld. counsel for the petitioner on the matter of delay and laches is more or less settled law that claim of the petitioner could not be solely declined on the ground of delay and laches. Similarly, judgment of Hon'ble Apex Court in 2014 titled as Raghbir Singh's case also does not come to the rescue of the petitioner as in this judgment also the Hon'ble Apex Court has reiterated the mandate as given by the Hon'ble Apex Court in previous judgment in the year 2013 *i.e.* Assistant Engineer, Rajasthan State Agriculture Marketing Board, Sub-Division Kota and Mohan Lal's case. Similar view was reiterated by the Hon'ble Apex Court in judgment titled as **Vice Chancellor, Lucknow University, Lucknow, Uttar Pradesh v. Akhilesh Kumar Khare & another reported in 2016 (1) SCC 521**. Both the issues are thus decided accordingly.

Issues No. 2 & 4 :

29. In support of these issues no evidence has been led by the respondent. Therefore, in the absence of any specific evidence on record, these issues are decided against the respondent.

Issue No. 5 :

30. There is nothing on record which may show as to why this petition is not maintainable. Since, pursuance to the reference made to this Court, the petitioner had filed the statement of claim, the same is held to be maintainable because this court is required to answer the reference. Even from the reply, which has been filed by the respondent, it is not revealed as to how the petitioner is estopped from filing this petition. Thus, this issue is decided in favour of the petitioner and against the respondent.

Relief :

31. For the foregoing reasons discussed hereinabove supra, the respondent is directed to pay an amount of ` 50,000/- (Fifty Thousand only) to the petitioner as lump sum compensation in lieu of his termination. The amount shall be paid within sixty days from the announcement of award failing which the respondent shall pay interest @ 9% per annum till the realization of the amount. Let a copy of this award be communicated to the appropriate government for publication in the official gazette. File, after completion, be consigned to records.

32. The reference is answered in the aforesaid terms. Ordered accordingly.

Announced in the open Court today this 1st day of November 2021.

Sd/-
(RAJESH TOMAR),
Presiding Judge,
Industrial Tribunal-cum-Labour Court, Shimla.

**IN THE COURT OF SHRI RAJESH, TOMAR PRESIDING JUDGE, H.P. INDUSTRIAL
TRIBUNAL-CUM-LABOUR COURT, SHIMLA**

Reference Number : 37 of 2019

Instituted on : 15-1-2019

Decided on : 1-11-2021

Leela Dhar s/o Shri Mittar Dev, r/o Village Sadehra, P.O Sidhyani, Tehsil Balh District
Mandi, H.P. . *Petitioner.*

Versus

The Managing Director, Himachal Pradesh Tourism Development Corporation, Near Ritz,
Shimla, H.P. . *Respondent.*

Reference under Section 10 of the Industrial Disputes Act, 1947

For the Petitioner: Shri R. K Khidtta, Advocate

For the Respondent: Shri Kartik Kumar, Advocate

AWARD

The following reference petition has been, received from the Appropriate Government for final adjudication:

“Whether termination of services of Shri Leela Dhar s/o Shri Mittar Dev r/o Village Sadehra, P.O. Sidhyani, Tehsil Balh, District Mandi, H.P. who had worked as Washer Boy, by the Managing Director, Himachal Pradesh Tourism Development Corporation, Near Ritz, Shimla-1 w.e.f. 16-11-2013 without complying with the provisions of the Industrial Disputes Act, 1947, as alleged by the workman, is legal and justified? If not, what relief including reinstatement, amount of back-wages, past service benefits and compensation the above ex-worker is entitled to from the above employer?”

2. On receipt of the said reference from the Appropriate Government, notices were issued to the concerned parties in pursuance to which the petitioner has filed the statement of claim.

3. The case of the petitioner as it emerges from the statement of claim is that the petitioner was engaged as “Utility worker” on 10-5-2011 in the transport wing of HPTDC work shop Ghora Chowki for 89 days and worked as such till 16-11-2013 continuously and thereafter his services were illegally terminated and after some time w.e.f. 24-4-2014, the petitioner was re-engaged and worked till 30-9-2018 but he has been shown to be re-engaged through contractor whereas he was engaged by the respondent Corporation as the attendance of the petitioner was verified and signed by the official of the Corporation. The leave was also sanctioned by the official of the Corporation and the petitioner was under the direct supervision and control of the Corporation. It is further averred that the services of the petitioner have been orally terminated by the respondent firstly w.e.f. 17-11-2013 and thereafter w.e.f. 30-9-2018 without following the mandatory provisions of the Industrial Disputes Act, 1947 (hereinafter referred to be as the Act) as no notice or pay in lieu of notice and retrenchment compensation has been paid to the petitioner as

the petitioner is a workman as defined under the Act and he used to work manually with the Corporation. It is further averred that the petitioner worked with utmost honesty and dedication and his work was always appreciated by the official of the respondent Corporation and nothing contrary was ever conveyed to him. The Corporation intentionally used to give fictional breaks to the petitioner which was totally illegal as the work which he had performed was continuous in nature and is still available with the respondent Corporation. It is averred that on 16-11-2013, the petitioner was not allowed to work and his services were orally terminated and on his request to re-engage him on the same post with all benefits, he was re-engaged after seven months but no seniority and continuity was not given to him and ultimately his services were again terminated *w.e.f.* 30-9-2018. After his illegal termination, the petitioner visited the office of the respondent number of time and requested to re-engage him but of no avail and he was forced to file demand notice before the Labour Inspector-cum-Conciliation Officer, Shimla in which the respondent was duly served. Since, the petitioner had completed 240 days in a calendar year and his juniors are still working with the respondent and even the respondent Corporation failed to follow the principles of “Last Come First Go” and as such his termination is totally against the the mandatory provisions of sections 25-F, 25-G and 25-H of the Act and after the illegal termination of the petitioner, he is unemployed.

4. It is therefore prayed from the side of the petitioner that the impugned termination order dated 16-11-2013 and 30-9-2018 passed by the respondent Corporation may kindly be quashed and set-aside and the respondent may kindly be directed to re-instate the petitioner in service with all service benefits including full back-wages and his services may be ordered to be regularized as he has already completed six years of service with the respondent. It is further prayed that the respondent may also be burdened with the cost of litigation amounting to ` 30,000/- and to pay the damages amounting to ` 50,000/- for the harassment caused to the petitioner and his family members due to their illegal action. It is also prayed that any other order which deem just and proper in the resent facts and circumstances of the case/reference may also be passed in favour of the petitioner and against the respondent and justice be done with the petitioner.

5. On notice, the respondent Corporation appeared and filed reply to the claim petition by asserting preliminary objections regarding guilty of suppression veri suggestio falsi, no relationship of employer and employee, maintainability, there exists no industrial dispute, no cause of action, claim is a blatant misuse of the judicial process, estoppel and failed to implead M/s Corporate Care as necessary party.

6. On merits, the petitioner was initially engaged as a seasonal worker as a utility worker as per the agreements, in the transport wing of HPTDC Workshop Ghora Chowki, Shimla. He did not work continuously from May 2012 till August 2013. It is denied that the services of the petitioner were illegally terminated and were re-engaged. It is pertinent to mention that after notification dated 17-12-2013, the respondent never hire any worker at their own and the respondent seek services of the outsourcing agencies for this purpose. It is denied that the respondent initially used to give fictional breaks to the petitioner which was totally illegal as the work performed by the petitioner was continuous in nature and is still available. It is further denied that the petitioner was not allowed to work and his services were terminated without complying with the mandatory provisions of the Act on 17-11-2013. The petitioner has no legal right or authority to file demand notice. It is denied that the petitioner has already completed 240 days each calendar year. It is also denied that the termination of the services of the petitioner is illegal, arbitrary and unjust.

7. In view of submissions made hereinabove, it is prayed that the claim petition is liable to be dismissed.

8. While filing rejoinder, the petitioner controverted the averments made thereto in the reply and reaffirmed and reiterated those in the statement of claim.

9. On elucidating the pleading of parties, the following issues were struck down by my Learned Predecessor for its final determination vide Court order dated 3-7-2019 :

1. *Whether the termination of services of the petitioner w.e.f. 16-11-2013 is violative of the provisions of the Industrial Disputes Act, as alleged. If so, its effect thereto? . . .OPP.*
2. Whether the petitioner has approached this Court with unclean hands and suppressed material facts from this Court as alleged? If so its effect thereto? . . .*OPR.*
3. Whether the claim is not maintainable as it is stated to be barred by limitation as alleged? If so, its effect thereto? . . .*OPR.*
4. Whether the petition is bad for non-joinder/mis-joinder of necessary parties, as alleged? If so, its effect thereto? . . .*OPR.*
5. Whether the reference is not maintainable and the petitioner is estopped from filing of claim as he was engaged on seasonal basis, as alleged? If so its effect thereto? . . .*OPR.*
6. Relief

10. Henceforth, parties to the dispute were asked to adduce oral as well as documentary evidence in support of their respective claims or issues so framed.

11. Arguments of the Learned Counsel for the petitioner as well as Learned Counsel for respondent were heard and gone through the case record with minute care, caution circumspection.

12. For the reasons to be recorded hereinafter while discussing the aforesaid issues, my findings on the aforesaid issues are as follows:

Issue No. 1 :	Partly Yes
Issue No. 2 :	No
Issue No. 3 :	No
Issue No. 4 :	No
Issue No. 5 :	No
Relief :	Reference is partly allowed per operative part of the Award

REASONS FOR FINDINGS

Issues No.1 & 3 :

13. Being interlinked and inter-connected both these issues are taken up together for discussion and decision.

14. At the very inception, there is no denial of the fact that the relationship of the petitioner having been engaged as daily wage/contract worker to supplement its manpower requirement during season which shall be commenced from the date of agreement and shall automatically terminated after expiring of 89 days. As a matter of fact, the petitioner will perform such unskilled

work on casual basis which may be assigned to him in the Transport Wing of the respondent. The contractual work shall be automatically terminated after the completion of 89 days and no formal notice/order will be required to be given by either party for the termination of agreement. It is mint for seasonal and specific period and shall not claim the renewal of his engagement as casual worker. It is further agreed that the extension of the agreement will be at the sole discretion of the respondent Corporation. The petitioner shall be deployed from time to time and obey the orders, instructions or directions issued by the respondent Corporation from time to time. The petitioner will be entitled for payment of ` 120/- only per day. It is also agreed between the parties that the agreement shall be terminated in case the respondent Corporation finds the petitioner to be prima-facie guilty of any insubordination, moral turpitude or other misconduct or breach of any condition of agreement or is otherwise found unsuitable for the job, the respondent reserves its right to terminate the agreement. It is further agreed upon the said agreement that any right to claim for his absorption in the Corporation against regular vacancy that may exists or arise in the future. It is not in dispute that no written order was passed while terminating the services of the petitioner as the claim of the respondent remains that it had not retrenched the petitioner from service who had abandoned the job of his own and used to work intermittently as per his own wish and convenience. Admittedly, the reference of the Appropriate Government does not at all relates to plea of fictional breaks but only with regard to petitioner's termination from service. In the backdrop of the said events of foregoing admitted facts on record, the claim of petitioner requires to be adjudicated with a view to determine if petitioner is entitled for relief of reinstatement and back wages along-with seniority and past service benefits and compensation as claimed by him.

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2-4-2013 and worked till 16-11-2013 as per the mandays chart (PW-2/A). The bill and vouchers are not produced due to unavailability. One Surender Kumar has been re-engaged by the Corporation in the year 2017 through normal appointment process who is still working with the respondent as Utility worker.

18. On the other hand, the respondent Corporation examined one Shri Man Singh, Senior Assistant (RW-1) who has tendered in evidence his affidavit (RW-1/A). He also tendered in evidence authority letter (RW-1/B), copies of agreements dated 2-4-2013 and 18-9-2013 (RW-1/C & RW-1/D) and copy of notification (RW-1/E).

19. In cross-examination he admitted that the petitioner was engaged as utility worker with the respondent corporation since 10-5-2011. He further admitted that the services of the petitioner were terminated on 17-11-2013. He also admitted that no notice or compensation was paid to the petitioner before terminating his services and that no enquiry was conducted prior to his termination. He admitted that after 24-4-2014, the services of the petitioner have been shown to be engaged on out-source basis through contractor and no notice under section 9-A of the Act was issued to him before changing his service conditions. He admitted that as per the reply dated 30-10-2017 (PX), Surender Kumar was engaged as utility worker as mentioned in para 3 of the reply. He admitted that the work of utility is being dispensed with in the respondent Corporation since 2012. He admitted that as per reply the Corporation maintains the attendance and leave record and that the petitioner was working under the supervision and direction of the respondent. However, this witness denies that the petitioner worked till 16-8-2013 continuously. He further denied that the petitioner has completed 240 working days continuously prior to his termination on 17-8-2013 and also in preceding twelve months. He denied that notification (RW-1/E) was issued to those workers who have been engaged after the year 2013 and that the notification (RW-1/E) was not applicable to the workers working prior to 2013. He denied that the petitioner was engaged by the respondent on 24-4-2014 and terminated on 30-9-2018 without serving any notice or compensation. This witness also denied that the Corporation used to give fictional breaks to the petitioner intentionally so that he could not complete 240 days in a calendar year. He expressed his ignorance that the services of Dinesh Thakur, Santosh Devi and Yashwant Singh junior to the petitioner were regularized by the Corporation.

20. It is pertinent to mention here that the plea of abandonment raised by the respondent is concerned, the same merits rejection in view of the fact that respondent had failed to produce any record by which it could be established that whenever petitioner absented from his duty as also reflected in mandays chart (PW-2/A) no notice was ever issued to him. As such, in absence of any specific and reliable evidence led by respondent, it would be unsafe to hold that respondent had established plea of abandonment.

21. Verily, an overall assessment, analysis and synthesis of the mandays chart (PW-2/A) would reveal that petitioner had worked for 29 days in the month of April 2013, 31 days in the month of May 2013 and 29 days in the month of June 2013 total 89 days in the year 2013, 13 days in the month of September 2013, 31 days in the month of October 2013, 16 days in the month of November 2013 in total the petitioner had worked for 149 days in the year 2013. Thus it is clear that the petitioner had worked for 149 days with the respondent in the year 2013. Be it noticed that in the year 2013, the petitioner had worked for 149 days and there is no reference from the Labour Commissioner, Shimla on the point of artificial breaks, this Court is to confine its findings only with regard to alleged illegal termination. It is evident from mandays chart (PW-2/A) that in the year 2013 the petitioner had merely worked for 149 days and thus immediately in preceding 12 calendar months from the month of termination of petitioner had not rendered service of 240 days so as to meet requirement of law of having continuous service of one year and thus it was not at all required from respondent to have issued a notice envisaged under Section 25-F of the Act. As such, the respondent is held to have not violated the provisions of Section 25-F of the Act.

22. Ld. Counsel for petitioner has contended with vehemence that large number of workers who were junior to petitioner had been appointed and these workers have been retained in service and regularized. The grievance of petitioner remains that principle of 'Last come First go' was not followed as the juniors were retained and services of petitioner despite being senior was terminated without any valid reason. Evidently, there is no iota of evidence of respondent establishing that petitioner was called upon to join for service at any time after May, 2004 even at the time when junior persons were reengaged. That being so the respondent had certainly violated the provisions of Section 25-G of the Act. Ld. Authorized Representative for petitioner has placed reliance upon judgment of **Central Bank of India vs. S. Satyam, 1996 (5) SCC 418** in which Hon'ble Apex Court has held that for the applicability of Section 25-G and 25-H of the Act, there was no necessity of claimant/petitioner to have worked for 240 days as in case of provisions of Section 25-F of the Act.

23. Per contra, repudiating claim of petitioner, the respondent, on the other hand, has made futile attempt to justify engagement of junior workers. As stated above that petitioner remained out of job after his termination but there is nothing authenticated in evidence suggesting that he remained without earning and petitioner as (PW1) has nowhere stated that he had opted out for job when terminated from service. As such, it is held that after his termination he was not in government job and cross-examination of (PW1) reveals that he had not been paid retrenchment compensation and notice at the time of retrenchment. Since the respondent had failed to prove on record any seniority list by which it would be stated that persons who were junior to petitioner were retained in service whereas petitioner who was senior and thus respondent had clearly violated Section 25-G of Industrial Disputes Act. In view of ratio of judgment of Hon'ble Apex Court reported in **2015 (4) SCC 544** titled as **Mackinnon Machenzie & Company Ltd. vs. Mackinnon Employees Union** which mandatorily requires the employer to circulate seniority list as prepared. There is no iota of evidence on record remotely suggesting that respondent had provided seniority list of daily waged workers. As such, plea of petitioner that he was ignored and new hands were allowed to join is to be accepted. In view of foregoing discussions, respondent is held to have violated the provisions of Section 25-G and 25-H of the Industrial Disputes Act. As such, even when petitioner is proved to have not worked for more than 160 days in preceding four years which entitled him for regularization of his service per government policy, yet respondent is not absolved from its accountability of provisions of Section 25-G and 25-H of the Act and as such it is held that respondent had violated the provisions of Sections 25-G and 25-H of the Industrial Disputes Act.

24. Since, the termination of the petitioner having been held to be in violation of the provisions of sections 25-G and 25-H of the Act, the next question which thus gains significance is as to what relief the petitioner is entitled to.

25. Recent trends, more particularly much after the year 2007 shows that grant of compensation in lieu of reinstatement has gained precedence, more particularly, where the services of the workmen have been terminated because of procedural defects. In the case in hand too the termination is found to be illegal in view of the provisions of sections 25-G and 25-H of the Act, the interest of justice would thus be met, in case the petitioner is granted compensation in lieu of reinstatement thereof. In this behalf support can ably be drawn from the judgment of the Hon'ble Supreme Court titled as **Bharat Sanchar Nigam Ltd. Vs. Bhurumal (2014) 7 SCC 177** and further reiterated lately in **P. Karupiah (dead) through Legal Representatives Vs. General Manager, Thruvavalluvar Transport Corporation Ltd. (2018) 12 SCC 663 and Rashtrasant Tukdoji Maharaj Technical Education Samstha, Nagpur Vs. Prashant Manikrao Kubitkar (2018) 12 SCC 294**.

26. Furthermore, Ld. Counsel representing respondent Corporation has also contended with vehemence that claim petition is barred by limitation as the same has been filed beyond the period of limitation without assigning any reasonable cause. It has been pointed that termination of

petitioner in this case took place on 2012 and the industrial dispute was raised after several years of retrenchment. Repudiating the argument by Learned Counsel for respondent, Id. counsel for the petitioner has placed reliance upon judgment reported in **2007 LHLJ 903 Hon'ble High Court of H.P. Bhatag Ram's case** in which it has been held that delay in raising dispute may be considered by court at the time of granting final relief however in various other judgments even longer delay has been condoned. **In Divisional Manager, HPFC & another vs. Garibu Ram, Latest HLJ 2007 (HP) 1160,** delay of more than 10 years was condoned besides Hon'ble High Court has held that principle of Limitation Act is not applicable to the industrial dispute. Similar view was taken by Hon'ble Apex Court in **Ajayab Singh vs. Sirhind Co-operative Marketing-cum-Processing Society Limited and Another. (1999) 6 SCC 82** in which it has been held that the principle of Limitation Act, 1963 did not apply to the proceeding under the Industrial Disputes Act.

27. On elucidation of the above mentioned judgments, it has been contended that claim of petitioner cannot be defeated on the point of delay and laches. Repudiating arguments advanced by Ld. Counsel for the petitioner, Learned Counsel for respondent, has placed reliance upon the judgment of Hon'ble Apex Court titled as **Assistant Engineer, Rajasthan State Agriculture Marketing Board, Sub-Division Kota and Mohan Lal 2013 (9) SCR 91,** the relevant para of the judgment are produced below for reference:

21. Now, if the facts of the present case are seen, the position that emerges is this: the workman worked as a work-charged employee for a period from 1-11-1984 to 17-2-1986 (in all he worked for 286 days during his employment). The services of the workman were terminated with effect from 18-2-1986. The workman raised the industrial dispute in 1992, i.e. after 6 years of termination. The Labour Court did not keep in view admitted delay of 6 years in raising the industrial dispute by the workman. The judicial discretion exercised by the Labour Court is, thus, flawed and unsustainable. The Division Bench of the High Court was clearly in error in restoring the award of the Labour Court whereby reinstatement was granted to the workman. Though, the compensation awarded by the Single Judge was too low and needed to be enhanced by the Division Bench but surely reinstatement of the workman in the facts and circumstances is not the appropriate relief.

22. In our opinion, interest of justice will be subserved if in lieu of reinstatement, the compensation of Rs.1,00,000/- (one lac) is paid by the appellant (employer) to the respondent (workman). We order accordingly. Such payment shall be made by the appellant to the respondent within six weeks from today failing which the same will carry interest @ 9% per annum....."

28. Thus, from a careful examination of the entire pleadings and evidence of the case leading to the peculiar facts, circumstances and evidence vis-à-vis having gone through the rival contention of the Learned counsel for the parties, keeping in view the mandate of Hon'ble Apex Court in various judgments referred to above, it is held that delay in raising industrial dispute is definitely an important circumstance and court has to keep in mind while exercising discretion. In para nos. 21 and 22 of judgment 2013 supra has referred to Gitam Singh's case reported in **2013 (5) SCC 136 titled as Assistant Engineer Rajasthan Development Corporation and another vs. Geetam Singh** observing that before exercising its judicial discretion, the Labour Court has to keep in view all relevant factors including the mode and manner of appointment, nature of employment, length of service, the ground on which termination has been set aside and the delay in raising industrial dispute before grant of relief in an industrial dispute. It was observed by the Hon'ble Apex Court in judgment (2013 supra) before that workman had worked for 286 days and had raised industrial dispute in 1992 whereas his services have been terminated in 1986 and he raised industrial dispute after six years. The Hon'ble Apex Court has held that though compensation awarded by Single Judge of the Hon'ble High Court was too low and liable to be enhanced by the

Division Bench but surely reinstatement of the workman in the facts and circumstances is not the appropriate relief and thus Hon'ble Apex Court awarded a lump-sum of Rs. one lakh along-with interest @ 9% per annum if the respondent failed to make payment of compensation within six weeks from the date of judgment. In the case in hand before this court factors which have weighed are that the petitioner in all remained worked for 149 days as per mandays chart (PW-2/A) on record and that the services of petitioner were disengaged in November 2013, who worked as utility worker and had raised industrial dispute by issuance of demand notice after about 4 years. It is also pertinent to mention here that petitioner on the date of filing claim petition was ageing 29 years who has sufficient spell of life to work and earn his livelihood. Taking into consideration factors mentioned above in pursuance to judgments of Hon'ble Apex Court petitioner would not be entitled either for reinstatement or for back wages but compensation a lump-sum would be appropriate relief in view of judgment **2013 (9) SCR 91**. The judgments relied upon by ld. counsel for the petitioner on the matter of delay and laches is more or less settled law that claim of the petitioner could not be solely declined on the ground of delay and laches. Similarly, judgment of Hon'ble Apex Court in 2014 titled as Raghbir Singh's case also does not come to the rescue of the petitioner as in this judgment also the Hon'ble Apex Court has reiterated the mandate as given by the Hon'ble Apex Court in previous judgment in the year 2013 i.e. Assistant Engineer, Rajasthan State Agriculture Marketing Board, Sub-Division Kota and Mohan Lal's case. Similar view was reiterated by the Hon'ble Apex Court in judgment titled as **Vice Chancellor, Lucknow University, Lucknow, Uttar Pradesh v. Akhilesh Kumar Khare & another** reported in **2016 (1) SCC 521**. Both the issues are thus decided accordingly.

Issues No. 2 & 4 :

30. In support of these issues no evidence has been led by the respondent. Therefore, in the absence of any specific evidence on record, these issues are decided against the respondent.

Issue No. 5 :

30. There is nothing on record which may show as to why this petition is not maintainable. Since, pursuance to the reference made to this Court, the petitioner had filed the statement of claim, the same is held to be maintainable because this court is required to answer the reference. Even from the reply, which has been filed by the respondent, it is not revealed as to how the petitioner is estopped from filing this petition. Thus, this issue is decided in favour of the petitioner and against the respondent.

Relief :

31. For the foregoing reasons discussed hereinabove supra, the respondent is directed to pay an amount of ` 50,000/- (Fifty Thousand only) to the petitioner as lump sum compensation in lieu of his termination. The amount shall be paid within sixty days from the announcement of award failing which the respondent shall pay interest @ 9% per annum till the realization of the amount. Let a copy of this award be communicated to the appropriate government for publication in the official gazette. File, after completion, be consigned to records.

32. The reference is answered in the aforesaid terms. Ordered accordingly.

Announced in the open Court today this 1st day of November 2021.

Sd/-
(RAJESH TOMAR),
Presiding Judge,
Industrial Tribunal-cum-Labour Court, Shimla.

हिमाचल प्रदेश विधान सभा सचिवालय

अधिसूचना

दिनांक 14 मार्च, 2022

संख्या वि०स०-विधायन-सरकारी विधेयक/1-8/2022.—हिमाचल प्रदेश विधान सभा की प्रक्रिया एवं कार्य संचालन नियमावली, 1973 के नियम 140 के अन्तर्गत हिमाचल प्रदेश नगर निगम (संशोधन) विधेयक, 2022 (2022 का विधेयक संख्यांक 2) जो आज दिनांक 14 मार्च, 2022 को हिमाचल प्रदेश विधान सभा में पुरःस्थापित हो चुका है, सर्वसाधारण की सूचनार्थ राजपत्र (ई-गजट), में अधिसूचित करने हेतु प्रेषित किया जाता है।

हस्ताक्षरित/—
यशपाल,
सचिव,
हि० प्र० विधान सभा।

2022 का विधेयक संख्यांक 2

हिमाचल प्रदेश नगर निगम (संशोधन) विधेयक, 2022

खण्डों का क्रम

खण्ड :

1. संक्षिप्त नाम और प्रारम्भ।
2. धारा 6 का संशोधन।
3. 2022 के हिमाचल प्रदेश अध्यादेश संख्यांक 1 का निरसन और व्यावृत्तियां।

2022 का विधेयक संख्यांक 2

हिमाचल प्रदेश नगर निगम (संशोधन) विधेयक, 2022

(विधान सभा में पुरःस्थापित रूप में)

हिमाचल प्रदेश नगर निगम अधिनियम, 1994 (1994 का अधिनियम संख्यांक 12) का और संशोधन करने के लिए विधेयक।

भारत गणराज्य के तिहत्तरवें वर्ष में हिमाचल प्रदेश विधानसभा द्वारा निम्नलिखित रूप में यह अधिनियमित हो :—

1. संक्षिप्त नाम और प्रारम्भ.—(1) इस अधिनियम का संक्षिप्त नाम हिमाचल प्रदेश नगर निगम (संशोधन) अधिनियम, 2022 है।

(2) यह 03 फरवरी, 2022 को प्रवृत्त हुआ समझा जाएगा।

2. धारा 6 का संशोधन.—हिमाचल प्रदेश नगर निगम अधिनियम, 1994 की धारा 6 के खण्ड (क) के परन्तुक में, “सैंतीस” शब्द के स्थान पर “इकतालीस” शब्द रखा जाएगा।

3. 2022 के हिमाचल प्रदेश अध्यादेश संख्यांक 1 का निरसन और व्यावृत्तियां.—(1) हिमाचल प्रदेश नगर निगम (संशोधन) अध्यादेश, 2022 का एतद्वारा निरसन किया जाता है।

(2) ऐसे निरसन के होते हुए भी इस प्रकार निरसित अध्यादेश के अधीन की गई कोई बात या कार्यवाई इस अधिनियम के तत्स्थानी उपबन्धों के अधीन की गई समझी जाएगी।

उद्देश्यों और कारणों का कथन

हिमाचल प्रदेश नगर निगम अधिनियम, 1994 (1994 का अधिनियम संख्यांक 12) की धारा 6 यह उपबन्धित करती है कि नगर निगम में सीधे निर्वाचन द्वारा भरे जाने वाले कुल स्थानों (सीटों) की संख्या 37 (सैंतीस) से अधिक नहीं होगी और प्रत्येक वार्ड में जनसंख्या 2500 (दो हजार पांच सौ) से कम नहीं होगी। अब, यह देखा गया है कि बहुत से वार्डों में जनसंख्या में अत्यधिक वृद्धि हुई है। अत्यधिक जनसंख्या की मांगों और आवश्यकताओं को पूर्ण करना निर्वाचित पार्षद के लिए कठिन हो गया है। अतः समुचित नागरिक सुख-सुविधाओं के उचित प्रबंध, संतुलित अभिवृद्धि और विकासात्मक गतिविधियों में जन-सहभागिता सुनिश्चित करने के आशय से वार्डों की अधिकतम संख्या में वृद्धि की जानी आवश्यक हो गई है।

चूंकि हिमाचल प्रदेश विधान सभा सत्र में नहीं थी और नगर निगम शिमला के आगामी निर्वाचनों के दृष्टिगत हिमाचल प्रदेश नगर निगम अधिनियम, 1994 (1994 का अधिनियम संख्यांक 12) में संशोधन किया जाना अत्यावश्यक था, इसलिए, हिमाचल प्रदेश के राज्यपाल द्वारा भारत के संविधान के अनुच्छेद 213 के खण्ड (1) के अधीन प्रदत्त शक्तियों का प्रयोग करते हुए, 01 फरवरी, 2022 को हिमाचल प्रदेश नगर निगम (संशोधन) अध्यादेश, 2022 (2022 का अध्यादेश संख्यांक 1) प्रख्यापित किया गया था जिसे राजपत्र, (ई-गजट) हिमाचल प्रदेश में 3 फरवरी, 2022 को प्रकाशित किया गया था। अब उक्त अध्यादेश को बिना किसी उपान्तरण के नियमित अधिनियमिती द्वारा प्रतिस्थापित किया जा रहा है।

यह विधेयक उपर्युक्त उद्देश्यों की पूर्ति के लिए है।

(सुरेश भारद्वाज)
प्रभारी मंत्री।

शिमला:

तारीख:, 2022

वित्तीय ज्ञापन

—शून्य—

प्रत्यायोजित विधान सम्बन्धी ज्ञापन

—शून्य—

AUTHORITATIVE ENGLISH TEST

BILL NO. 2 OF 2022

**THE HIMACHAL PRADESH MUNICIPAL CORPORATION
(AMENDMENT) BILL, 2022**

ARRANGMENT OF CLAUSES

Clauses :

1. Short title and commencement.

2. Amendment of section 6.
3. Repeal of the H.P. Ordinance No. 1 of 2022 and savings.

Bill No. 2 of 2022

THE HIMACHAL PRADESH MUNICIPAL CORPORATION (AMENDMENT) BILL, 2022

(AS INTRODUCED IN THE LEGISLATIVE ASSEMBLY)

A

BILL

further to amend the Himachal Pradesh Municipal Corporation Act, 1994 (Act No. 12 of 1994).

BE it enacted by the Legislative Assembly of Himachal Pradesh in Seventy-third Year of the Republic of India as follows:—

1. Short title and commencement.—(1) This Act may be called the Himachal Pradesh Municipal Corporation (Amendment) Act, 2022.

(2) It shall be deemed to have come into force on the 3rd day of February, 2022.

2. Amendment of section 6.—In section 6 of Himachal Pradesh Municipal Corporation Act, 1994, in clause (a), in the proviso, for the words “thirty seven”, the words “forty one” shall be substituted.

3. Repeal of the H.P. Ordinance No. 1 of 2022 and savings.—(1) The Himachal Pradesh Municipal Corporation (Amendment) Ordinance, 2022 is hereby repealed.

(2) Notwithstanding such repeal any action taken or anything done under the Ordinance so repealed, shall be deemed to have been done or taken under the corresponding provisions of this Act.

STATEMENT OF OBJECTS AND REASONS

Section 6 of the Himachal Pradesh Municipal Corporation Act, 1994 (Act No. 12 of 1994) provides that the number of total seats to be filled by direct election in a Municipal Corporation shall not exceed thirty-seven and in each ward the population shall not be less than 2500. Now, it has been observed that in many wards, the population has increased many folds. It is difficult for an elected councillor to cater to the demands and needs of large population. Therefore, in order to ensure proper arrangements of the civic amenities, balanced growth and people’s participation in the developmental activities; the limit of maximum number of the wards is needed to be increased.

Since the Himachal Pradesh Legislative Assembly was not in session and the Himachal Pradesh Municipal Corporation Act, 1994 (Act No. 12 of 1994) had to be amended urgently in

view of the coming elections of the Municipal Corporation Shimla, therefore, the Governor, Himachal Pradesh, in exercise of the powers under clause (1) of Article 213 of the Constitution of India, promulgated the Himachal Pradesh Municipal Corporation (Amendment) Ordinance, 2022 (Ordinance No. 1 of 2022) on 1st February, 2022 and the same was published in the Rajpatra (e-Gazette), Himachal Pradesh on 3rd February, 2022. Now, the said ordinance is being replaced by a regular enactment without any modification.

This Bill seeks to achieve the aforesaid objectives.

(SURESH BHARDWAJ)

Minister-in-Charge.

SHIMLA:

The....., 2022

FINANCIAL MEMORANDUM

—Nil—

MEMORANDUM REGARDING DELEGATED LEGISLATION

—Nil—

हिमाचल प्रदेश विधान सभा सचिवालय

अधिसूचना

शिमला, 14 मार्च, 2022

संख्या वि०स०-विधायन-सरकारी विधेयक/1-7/2022.—हिमाचल प्रदेश विधान सभा की प्रक्रिया एवं कार्य संचालन नियमावली, 1973 के नियम 140 के अन्तर्गत हिमाचल प्रदेश भू-राजस्व (संशोधन) विधेयक, 2022 (2022 का विधेयक संख्यांक 3) जो आज दिनांक 14 मार्च, 2022 को हिमाचल प्रदेश विधान सभा में पुरःस्थापित हो चुका है, सर्वसाधारण की सूचनार्थ राजपत्र (ई-गजट) में अधिसूचित करने हेतु प्रेषित किया जाता है।

हस्ताक्षरित /—

(यशपाल),

सचिव,

हि० प्र० विधान सभा।

हिमाचल प्रदेश भू-राजस्व (संशोधन) विधेयक, 2022

खण्डों का क्रम

खण्ड :

1. संक्षिप्त नाम।
2. धारा 17 का प्रतिस्थापन।

2022 का विधेयक संख्यांक 3

हिमाचल प्रदेश भू-राजस्व (संशोधन) विधेयक, 2022

(विधान सभा में पुरःस्थापित रूप में)

हिमाचल प्रदेश भू-राजस्व अधिनियम, 1954 (1954 का अधिनियम संख्यांक 6) का और संशोधन करने के लिए विधेयक।

भारत गणराज्य के तिहत्तरवें वर्ष में हिमाचल प्रदेश विधान सभा द्वारा निम्नलिखित रूप में यह अधिनियमित हो:—

1. **संक्षिप्त नाम.**—इस अधिनियम का संक्षिप्त नाम हिमाचल प्रदेश भू-राजस्व (संशोधन) अधिनियम, 2022 है।

2. **धारा 17 का प्रतिस्थापन.**—हिमाचल प्रदेश भू-राजस्व अधिनियम, 1954 की धारा 17 के स्थान पर निम्नलिखित रखा जाएगा, अर्थात् :—

“17. **राजस्व अधिकारियों की कार्यवाहियों को मंगवाने, परीक्षण करने और पुनरीक्षण करने की शक्ति.**—वित्तायुक्त अपने अधीनस्थ किसी राजस्व अधिकारी के पास लंबित या उसके द्वारा निपटाए गए अथवा उसके समक्ष संस्थित किसी मामले का अभिलेख किसी भी समय मंगवा सकेगा और ऐसा आदेश, पारित कर सकेगा जैसा वह उचित समझे :

परन्तु वह इस धारा के अधीन, किसी अधीनस्थ राजस्व अधिकारी की किसी कार्यवाही या आदेश को उलटने का या उपांतरित करने तथा प्राइवेट व्यक्तियों के मध्य अधिकार के किसी प्रश्न पर प्रभाव डालने वाला कोई आदेश, उन व्यक्तियों को सुनवाई का अवसर दिए बिना, पारित नहीं करेगा।”।

उद्देश्यों और कारणों का कथन

हिमाचल प्रदेश भू-राजस्व अधिनियम, 1954 की धारा 17 की उप-धारा (2) और (3) के विद्यमान उपबंध कलक्टरों और आयुक्तों को उनके नियंत्रणाधीन किसी राजस्व अधिकारी के पास लंबित या निपटाए गए किसी मामले के अभिलेख की मांग करने हेतु सशक्त करते हैं। किन्तु यदि किसी मामले में आयुक्त या कलक्टर की यह राय है कि की गई कार्यवाही या किया गया आदेश उपांतरित या पुनरीक्षित किया जाना

चाहिए तो उसे मामले को अपनी सिफारिशों सहित आगामी आदेशों के लिए वित्तायुक्त को निर्दिष्ट करना होगा। पूर्वोक्त धारा के अधीन मामले पर विचार करते हुए आयुक्त या कलक्टर को समस्त हितबद्ध पक्षकारों को सुनवाई का अवसर प्रदान करना होगा। इसके अतिरिक्त, वित्तायुक्त पक्षकारों को ऐसी सिफारिशों पर आदेश पारित करने से पूर्व सुनवाई का अवसर प्रदान करने हेतु भी आबद्धकर है। इस प्रकार इस धारा के अधीन कार्यवाहियों की द्वैधता (ड्यूप्लिसिटी) है, जिसके परिणामस्वरूप पुनरीक्षण मामलों में अनावश्यक देरी और विलम्ब होता है। अतः पुनरीक्षण याचिका के माध्यम (चैनल) को संक्षिप्त (कम) करने के लिए, पूर्वोक्त अधिनियम की धारा 17 के अधीन पुनरीक्षण की शक्तियों को केवल वित्तायुक्त के पास ही रखना समुचित है। इस प्रकार, वांछित उद्देश्यों को प्राप्त करने हेतु अधिनियम में उपयुक्त संशोधन प्रस्तावित किए गए हैं।

यह विधेयक पूर्वोक्त उद्देश्यों की पूर्ति के लिए है।

(महेन्द्र सिंह ठाकुर)

प्रभारी मन्त्री।

शिमला :

तारीख :, 2022

वित्तीय ज्ञापन

—शून्य—

प्रत्यायोजित विधान सम्बन्धी ज्ञापन

—शून्य—

AUTHORITATIVE ENGLISH TEXT

BILL NO. 3 OF 2022

THE HIMACHAL PRADESH LAND REVENUE (AMENDMENT) BILL, 2022

ARRANGEMENT OF CLAUSES

Clauses:

1. Short title.
2. Substitution of section 17.

Bill No. 3 of 2022

THE HIMACHAL PRADESH LAND REVENUE (AMENDMENT) BILL, 2022

(AS INTRODUCED IN THE LEGISLATIVE ASSEMBLY)

A

BILL

further to amend the Himachal Pradesh Land Revenue Act, 1954 (Act No. 6 of 1954).

BE it enacted by the Legislative Assembly of Himachal Pradesh in the Seventy-third Year of the Republic of India as follows:—

1. Short title.—This Act may be called the Himachal Pradesh Land Revenue (Amendment) Act, 2022.

2. Substitution of section 17.—For section 17 of the Himachal Pradesh Land Revenue Act, 1954, the following shall be substituted, namely:—

“17. Power to call for, examine and revise proceedings of Revenue Officers.—The Financial Commissioner may at any time call for the record of any case pending before or disposed of by any Revenue Officer subordinate to him or instituted before him and may pass such order as he thinks fit:

Provided that he shall not, under this section, pass an order reversing or modifying any proceeding or order of a subordinate Revenue Officer and effecting any question of right between private persons without giving those persons an opportunity of being heard.”.

STATEMENT OF OBJECTS AND REASONS

The existing provisions of sub-sections (2) and (3) of section 17 of the Himachal Pradesh Land Revenue Act, 1954 empowers the Collectors and the Commissioners, to call for record of any case pending before or disposed of by a revenue officer under their control. But if in any case the Commissioner or the Collector is of the opinion that the proceeding taken or the order made should be modified or revised, he has to refer the matter with his recommendations to the Financial Commissioner for taking further orders. While considering the case under the aforesaid section, the Commissioner or the Collector has to provide opportunity of being heard to all the interested parties. Further, the Financial Commissioner is also bound to provide opportunity of being heard to the parties before passing an order on such recommendations. As such, there is duplicity of proceedings under this section, which results in un-necessary delay and pendency of the revision cases. Thus, in order to cut short the channel of revision petition, it is appropriate to keep the powers of revision under section 17 of the Act *ibid* with the Financial Commissioner only. Hence, suitable amendments have been proposed in the Act for achieving the desired objectives.

This Bill seeks to achieve the aforesaid objectives.

(MAHENDER SINGH THAKUR)
Minister-in-Charge.

SHIMLA :

The , 2022.

FINANCIAL MEMORANDUM—NIL—

MEMORANDUM REGARDING DELEGATED LEGISLATION—Nil—

हिमाचल प्रदेश तेरहवीं विधान सभा**अधिसूचना**

शिमला—171004, 15 मार्च, 2022

सं0वि0स0—कागजात/1—3/2022.—हिमाचल प्रदेश विधान सभा के प्रक्रिया एवं कार्य संचालन नियमावली, 1973 के नियम 207 के अन्तर्गत निम्न दस्तावेज को आज दिनांक 15 मार्च, 2022 को सभा पटल पर रखा गया है जिसकी अधिसूचना निम्न प्रकार से राजपत्र में प्रकाशित करने हेतु :—

भारत के नियन्त्रक एवं महालेखापरीक्षक के प्रतिवेदन 31 मार्च, 2020 को समाप्त वर्ष के लिए (सामाजिक, सामान्य एवं आर्थिक क्षेत्रों) हिमाचल प्रदेश सरकार (हिन्दी/अंग्रेजी);

यशपाल शर्मा,
सचिव,
हि0प्र0 विधान सभा।